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Survey of Illinois Law for the Year 1944-1945

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SURVEY OF ILLINOIS LAW FOR THE YEAR 1944-1945 *

I. BUSINESS ORGANIZATIONS

CORPORATIONS

CORPORATE by-laws must possess some foundation in reason in order to be valid. It was upon this test that the Appellate Court for the First District grounded its opinion in the case of *Electrical Contractors' Association v. A. S. Schulman Electric Company* ¹ wherein it upheld an association by-law which fixed the membership dues on a percentage basis of the amount of business done by the particular member.² By-laws of that type have been condemned in other jurisdictions, particularly as applied to contractors bidding upon public works, for the reason that the expense of membership would increase the public cost.³ The court concluded, however, that the method of charging dues was reasonable since the more active members would receive

* The present survey is not intended in any sense as a complete commentary upon, or annotation of, the cases decided by the Illinois courts during the past year, but is published rather for the purpose of calling attention merely to cases and developments believed significant and interesting. The period covered is that of the judicial year, embracing from 387 Ill. 1 to 390 Ill. 411; from 323 Ill. App. 74 to 326 Ill. App. 515. Statutory changes having general interest are also included.

¹ 324 Ill. App. 28, 57 N. E. (2d) 220 (1944). Leave to appeal has been granted but as yet no decision has been reported by the Illinois Supreme Court.

² The court also decided that a corporation for profit could be a member of an incorporated non-profit association. Although Ill. Rev. Stat. 1945, Ch. 32, § 157.5, contemplates corporate participation in other enterprises, the language thereof would seem to indicate that such grant is limited to participation in enterprises conducted for profit. The court, nevertheless, based its decision on this point upon principles of convenience and necessity: 324 Ill. App. 28 at 33-4, 57 N. E. (2d) 220 at 223.

³ Kentucky Ass'n of Highway Contractors v. Williams, 213 Ky. 167, 280 S. W. 937, 45 A. L. R. 544 (1926); Constructors' Ass'n of Western Pennsylvania v. Seeds, 142 Pa. Super. 59, 15 A. (2d) 467 (1940); Bailey v. Association of Master Plumbers, 103 Tenn. 99, 52 S. W. 853 (1899); Associated Wisconsin Contractors v. Lathers, 235 Wis. 14, 291 N. W. 770 (1940).

more service than the less active ones, hence ought to pay on a sliding scale, otherwise the cost of membership would be disproportionate to the benefits received. As the method utilized is one that has been extensively adopted,⁴ the final outcome of the case should be extremely significant.

The only other instances of judicial action possessing significance have bearing upon the business of banking. Contracts made by banking corporations may be struck down on the ground of ultra vires,⁵ but that form of attack must fail, according to *Margolis v. Uptown National Bank of Chicago*,⁶ if it in any way appears that some substantial benefit redounds to the bank under the contract. The bank there held a minor share of the beneficial interests under a liquidation trust formed to salvage properties acquired through foreclosure. Despite the fact that the bank had only a minor interest, it was held proper for it to undertake to pay all expenses involved in liquidating the properties on the ground that it possessed an implied power to take all or any action deemed necessary to protect the bank's interest.⁷

While the constitutional liability of shareholders in a banking corporation which has changed its name, increased its capital, or undergone other internal change, remains the same,⁸ an entirely different view applies to a banking corporation which has consolidated with another according to the ruling in *Burnett v. Garfield State Bank*.⁹ In the latter situation, the shareholders of the constituent banks making up the consolidated company are not necessarily relieved of liability upon their original shares,¹⁰ and may also be held upon the shares they acquire in the consolidated company. Because these liabilities are distinct, it was held that

⁴ The court noted that of 204 national and regional trade associations selected at random, approximately 61% levy dues on a sliding scale: 324 Ill. App. 28 at 39-40, 57 N. E. (2d) 220 at 225.

⁵ *Knass v. Madison & Kedzie State Bank*, 354 Ill. 554, 188 N. E. 836 (1934).

⁶ 323 Ill. App. 575, 56 N. E. (2d) 478 (1944).

⁷ An earlier abstract opinion in *Dolan v. Morensky*, 294 Ill. App. 615, 14 N. E. (2d) 313 (1938), had reached the same result.

⁸ *Holderman v. Moore State Bank*, 383 Ill. 534, 50 N. E. (2d) 741 (1943); *Heine v. Degen*, 362 Ill. 357, 199 N. E. 832 (1936).

⁹ 324 Ill. App. 190, 58 N. E. (2d) 187 (1944). Leave to appeal has been denied.

¹⁰ Whether a novation has occurred is a question of fact: *Burnett v. West Madison State Bank*, 375 Ill. 402 at 410-1, 31 N. E. (2d) 776 at 780 (1941).

a judgment based on one of them does not operate as *res adjudicata* as to the other. The court at the same time indicated that it would have been irregular to try out both liabilities in the same suit.¹¹ Although no Illinois court has, as yet, held that the beneficiaries of a business trust which owns shares in a bank may be subjected to the constitutional liability imposed for the benefit of the bank's creditors, that point has been determined by the Circuit Court of Appeals for the Seventh Circuit in the case of *Reconstruction Finance Corporation v. Goldberg*¹² where it was held that the court might go behind the record shareholder to reach the persons beneficially interested in the stock. An exculpatory clause such as is usually found in trust agreements creating business trusts was held to be ineffective to clothe the beneficiary with immunity from liability.

A decision which should go far toward accelerating the disposition of pending cases growing out of the banking collapse of the 1930's was handed down by the Illinois Supreme Court when it passed upon the appeal in *Decker v. Domoney*.¹³ It there held that a receiver appointed to collect judgments in a shareholders' liability suit might, upon proper application and showing, sell any uncollected judgments at public sale in order to complete liquidation. Although there is some doubt as to the legal basis for such holding,¹⁴ the practical results achieved are eminently desirable for a continuation of such litigation is unlikely to yield any substantial benefit to the unpaid creditors.

Legislative activity during the recent session concerning the statute law regulating corporations for profit was confined to the passage of one bill, but that measure amends a number of sections

¹¹ 324 Ill. App. 190 at 207, 58 N. E. (2d) 187 at 193. Statements in *Heine v. Degen*, 362 Ill. 357 at 375, 199 N. E. 832 at 840 (1936), to the effect that the bank there concerned should not be treated as two banks, one before and one after reorganization, were distinguished on the ground that only internal reorganization was there involved.

¹² 143 F. (2d) 752 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 256.

¹³ 387 Ill. 524, 56 N. E. (2d) 750 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 258. The Circuit Court of Appeals, Seventh Circuit, achieved a comparable result in *Wagner v. South Chicago Sav. Bank*, 146 F. (2d) 686 (1945). Major, C. J., wrote a dissenting opinion. See note, 19 So. Cal. L. Rev. 57.

¹⁴ See comment thereon in 23 CHICAGO-KENT LAW REVIEW 258, particularly pp. 260-1.

of the Business Corporation Act.¹⁵ Thus, language has been deleted from Section 5(h) so as to permit the corporation to make contracts and incur liabilities without the restriction heretofore existing that the same should be "appropriate to enable it to accomplish any or all of its purposes."¹⁶ The section regulating the defense of ultra vires has been recast and now extends to corporate acts as well as to conveyances and transfers.¹⁷ Demands for payment of subscriptions must hereafter be in writing.¹⁸ Service may be had on the Secretary of State whenever the registered agent cannot, with reasonable diligence, be found.¹⁹ Paid in or other surplus may be transferred to stated capital.²⁰ Treasury shares, whether acquired by redemption or purchase, may be cancelled.²¹ The power to cancel shares of a wholly-owned subsidiary appears to have been revoked.²² A new section regulates dividends in partial liquidation.²³ False response to interrogatories, as well as failure to respond, has been made a ground for dissolution.²⁴ Either a certificate of dissolution or a certified copy of the decree itself may be recorded upon completion of dissolution proceedings.²⁵ Other minor changes in terminology have been made to bring the act up to date.²⁶

A comparable statute has made substantially similar changes in the law relating to corporations organized not for pecuniary profit.²⁷ Detailed change has been made in the Building, Loan and Homestead Association Act;²⁸ an entirely new law has been enacted for the organization of medical service plan corpora-

¹⁵ Laws 1945, p. 544, et seq. H. B. 563.

¹⁶ Laws 1945, p. 544, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.5(h). Compare with Ill. Rev. Stat. 1943, Ch. 32, § 157.5(h).

¹⁷ Laws 1945, p. 545, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.8.

¹⁸ Laws 1945, p. 546, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.16.

¹⁹ Laws 1945, p. 546, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.13.

²⁰ Laws 1945, p. 547, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.19.

²¹ Laws 1945, p. 549, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.58a.

²² Compare Ill. Rev. Stat. 1945, Ch. 32, § 157.58a with Ill. Rev. Stat. 1943, Ch. 32, § 157.58a.

²³ Laws 1945, p. 548, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.41a.

²⁴ Laws 1945, p. 550, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.82.

²⁵ Laws 1945, p. 553, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, § 157.92.

²⁶ Laws 1945, p. 544, H. B. 563; Ill. Rev. Stat. 1945, Ch. 32, §§ 157.38, 157.83, 157.84, 157.90, and 157.94.

²⁷ Laws 1945, p. 586, H. B. 592; Ill. Rev. Stat. 1945, Ch. 32, §§ 163a5, 163a9, 163a11, and 163a69.

²⁸ Laws 1945, p. 560, H. B. 487; Ill. Rev. Stat. 1945, Ch. 32, § 217 et seq.

tions;²⁹ and substantial revision has occurred in the "Blue Sky" law.³⁰

PRINCIPAL AND AGENT

Some Appellate Court cases would seem worthy of mention under this heading. The case of *Molitor v. Chicago Title & Trust Company*³¹ gives Illinois a clear decision sustaining the doctrine of "permanent employment," with all its implications. The court held that a promise of "permanent employment" as a title examiner, in consideration of which plaintiff gave up the beginnings of a New York law practice and moved his family to Chicago, obligated the defendant to retain plaintiff in its employ so long as it had work of the type specified and he was capable of doing it. The court adopted the doctrine from the Massachusetts leading case of *Carnig v. Carr*.³²

The case of *Chicago Title & Trust Company v. Guild*³³ offers what is believed to be a novel but proper use of interpleader, *i. e.* a proceeding to interplead several real estate brokers each claiming a commission arising from the same sale. The property had been listed on a non-exclusive basis with several brokers. The court held that the four essentials of an interpleader action³⁴ were present and sustained the proceeding.

Because of factual rather than strict legal interest, attention is invited to the decision in *Shannessy v. Walgreen Company*,³⁵ in which the court reversed a judgment for plaintiff arising out of a battery. The altercation occurred in the early morning hours when plaintiff returned to defendant's store to adjust

²⁹ Laws 1945, p. 578, S. B. 652; Ill. Rev. Stat. 1945, Ch. 32, § 563 et seq.

³⁰ Laws 1945, p. 1323, H. B. 676; Ill. Rev. Stat. 1945, Ch. 121½, § 96 et seq.

³¹ 325 Ill. App. 124, 59 N. E. (2d) 695 (1945).

³² 167 Mass. 544, 46 N. E. 117 (1897).

³³ 323 Ill. App. 608, 56 N. E. (2d) 659 (1944).

³⁴ In *Morrill v. Manhattan Life Ins. Co.*, 183 Ill. 260 at 267, 55 N. E. 656 at 659 (1899), the court stated such essentials as being, "First, the same thing, debt or duty must be claimed by both or all the parties against whom the relief is demanded; second, all the adverse titles, or claims must be dependent on or be derived from a common source; third, the person asking the relief—the plaintiff—must not have or claim any interest in the subject matter; fourth, he must have incurred no independent liability to either of the claimants,—that is, he must stand perfectly indifferent between them, in the position, merely, of stake-holder."

³⁵ 324 Ill. App. 590, 59 N. E. (2d) 330 (1945).

differences between himself and the store manager arising out of the latter's charge that plaintiff had, on a prior occasion, stolen merchandise. The accusation had been made by the manager to plaintiff's companion, in plaintiff's absence, a few minutes before the fracas occurred and had been accompanied by the threat that if plaintiff "comes in here again I will hit him with a baseball bat." It was the repetition of this charge by the companion to the plaintiff which precipitated the latter's immediate return. Apparently, the store manager, after ordering plaintiff to depart and receiving the latter's refusal so to do, picked up a bat and struck plaintiff three times, breaking his arm. The court held that the battery was not committed within the scope of the master-servant relationship, stressing the fact that the assault was to avenge prior theft and that the manager was not "acting within either the express or implied authority of his position." The law is clear, of course, that liability of the master under the doctrine of *respondeat superior* is not limited to acts which are done with either express or implied authority.³⁶ The sole question would seem to be whether or not the servant was in the course of his employment at the time of the injury. It would seem particularly within the scope of employment of the night manager of a drug store to discourage the presence of persons believed undesirable. The remark made to plaintiff's companion would seem to be of this character. The return of the plaintiff to the store and the battery complained of may well be linked so closely with the comment referred to as to constitute part of the same transaction. Attention, however, is particularly invited to the fact that the court not only reversed the judgment based on the verdict but also ordered judgment entered for the defendant.

LABOR LAW

Suits against labor unions by their association names to recover damages at law allegedly resulting from certain union

³⁶ Mechem, Agency, 2d Ed., Vol. II, § 1855, states: "It may be an act expressly forbidden by the principal; it may have been an act which the principal feared and specifically warned against. . . ." See also 39 C. J., Master and Servant, § 1487 and authorities there cited.

activities have been unproductive for the Illinois courts have adhered to the common-law rule that unincorporated associations are not suable at law in the manner used for other entities. That rule has not been changed by statute. In *Kingsley v. Amalgamated Meat Cutters*³⁷ the court distinguished suits against fraternal benefit societies³⁸ as being specifically authorized by statute,³⁹ and certain other cases as being either injunction suits in equity⁴⁰ or contempt proceedings growing out of such suits.⁴¹ In another case, that of *Montgomery Ward & Company, Inc. v. Franklin Union*,⁴² the court rejected the contention that Section 24 of the Civil Practice Act⁴³ authorized such suits. The court held that the question was one of substance going to the jurisdiction of the court and not one of procedure. As long as trade unions remain unincorporated, there is little likelihood of holding them financially responsible in the absence of a special enabling statute.⁴⁴

WORKMEN'S COMPENSATION

Two unusual cases dealing with workmen's compensation arose during the year. In *Hudson v. Industrial Commission*⁴⁵ the applicant's deceased was, in his lifetime, employed to work for Hudson and also for a bus company. The work for each employer was of a different nature but the work required by both was in operation at the same time. When the deceased left to carry out his duties for his employers on the day his death occurred, he was not only enroute to perform but was, in fact, performing duties for both of them. The employer Hudson was not only engaged in business of his own but was also manager

³⁷ 323 Ill. App. 353, 55 N. E. (2d) 554 (1944).

³⁸ *Wade v. Grand Lodge Brotherhood of Railroad Trainmen*, 245 Ill. App. 532 (1928); *Wardlow v. Grand Lodge Brotherhood of Railroad Trainmen*, 245 Ill. App. 142 (1924).

³⁹ Ill. Rev. Stat. 1945, Ch. 73, § 894 et seq.

⁴⁰ *Western-United Dairy Co. v. Nash*, 293 Ill. App. 162, 12 N. E. (2d) 47 (1937); *Biller v. Egan*, 290 Ill. App. 219, 8 N. E. (2d) 205 (1937).

⁴¹ *Maywood Farms Co. v. Milk Wagon Drivers' Union of Chicago*, 316 Ill. App. 47, 43 N. E. (2d) 700 (1942), noted in 22 CHICAGO-KENT LAW REVIEW 8.

⁴² 323 Ill. App. 590, 56 N. E. (2d) 476 (1944). Leave to appeal has been denied.

⁴³ Ill. Rev. Stat. 1945, Ch. 110, § 148.

⁴⁴ Cases dealing with the Illinois Unemployment Compensation Act are dealt with under the subject of Taxation. Cf., post.

⁴⁵ 387 Ill. 228, 56 N. E. (2d) 423 (1944).

and principal stockholder in the bus corporation. The court held that as the deceased person was a joint employee on a joint mission, the two employers were jointly liable to pay the award. The court suggested that there are no Illinois cases in which the facts are parallel but mentioned an Arizona case as precedent.⁴⁶

In the other case, that of *Oran v. Kraft-Phenix Cheese Corporation*,⁴⁷ the Appellate Court arrived at an important decision concerning the right of an illegally-employed minor, where both employer and wrongdoer are under the act, to maintain a common-law action despite a failure to give statutory notice within six months of rejection of benefits under the act.⁴⁸ It held that, in view of the public policy of this state to protect the rights of minors,⁴⁹ there could be no clear statutory limitation running against the minor until a guardian had been appointed for him, particularly since the minor was legally incapable of making the rejection himself and was equally incapable of appointing an agent or attorney to act in his behalf.

PARTNERSHIP AND ASSOCIATIONS

No case law of significance has been made on this subject, but two changes made by the legislature are noteworthy. By one of them,⁵⁰ the limitation in the Uniform Limited Partnership Act which forbade a limited partnership from engaging in the brokerage business⁵¹ has been repealed. Such concerns are still denied the right to run banks, provide insurance or operate railroads.

In 1941, the legislature required that all persons using an assumed business name were obliged to register the same, with

⁴⁶ *Butler v. Industrial Commission*, 50 Ariz. 516, 73 P. (2d) 703 (1937).

⁴⁷ 324 Ill. App. 463, 58 N. E. (2d) 731 (1945), noted in 23 CHICAGO-KENT LAW REVIEW 355. See also Angerstein, *The Child Labor Act and The Workmen's Compensation Act of Illinois*, 20 CHICAGO-KENT LAW REVIEW 193 (1942), particularly pp. 202-5.

⁴⁸ Ill. Rev. Stat. 1945, Ch. 48, § 143.

⁴⁹ *Waechter v. Industrial Commission*, 367 Ill. 256, 11 N. E. (2d) 379 (1937); *Walgreen Co. v. Industrial Commission*, 323 Ill. 194, 153 N. E. 831, 48 A. L. R. 1199 (1926).

⁵⁰ Laws 1945, p. 1090, H. B. 542; Ill. Rev. Stat. 1945, Ch. 106½, § 46.

⁵¹ Ill. Rev. Stat. 1943, Ch. 106½, § 46.

other pertinent information, in the office of the clerk of the county court.⁵² A new section has now been added thereto which permits any person who filed such a certificate to cancel the same, in whole or in part, by filing a supplementary certificate under oath showing that such person has ceased doing business under the assumed name and no longer has any financial or other interest therein.⁵³

II. CONTRACTS

In complete harmony with accepted principles of contract law, but rather surprising to many lawyers as well as laymen, was the decision in *Groves v. Carolene Products Company*.¹ The defendant there, a manufacturer, offered a substantial prize to the contestant who furnished the most complete list of words constructed from the letters in the phrase "Milnot Whips." The traditional warning that the "decision of the judges shall be final" was a part of the offer. At the close of the contest, the judges awarded the prize to some one who submitted a less complete list of words than did the plaintiff. He filed suit for the prize and defendant countered with the contention that the "decision of the judges" was controlling.

A scrutiny of the questions raised under the facts and by the pleadings reveals that, in such a prize offer, the acceptance must be determined by objective standards which in the instant case would require a mere counting of the number of words submitted. As there was little or no room for any exercise of discretion by the judges of the contest, the provision in the offer that the "decision of the judges shall be final" was treated as surplusage and plaintiff's complaint was held to state a cause of action. It should, nevertheless, be observed that in competitions where the contest judges have been given room for discretion, *i. e.* contests involving "most beautiful," "most musical," "most poetical," "funniest," etc., the decision of the judges is controlling in the

⁵² Laws 1941, Vol. I, p. 550; Ill. Rev. Stat. 1943, Ch. 96, § 4 et seq.

⁵³ Laws 1945, p. 1088, S. B. 273; Ill. Rev. Stat. 1945, Ch. 96, § 6a.

¹ 324 Ill. App. 102, 57 N. E. (2d) 507 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 250, 39 Ill. L. Rev. 296.

absence of provable fraud for the standard of measurement is subjective.²

NEGOTIABLE INSTRUMENTS

The Appellate Court decision in *Ruwisch v. Theis*³ holds squarely that Section 20 of the Negotiable Instruments Act⁴ eliminates the applicability to negotiable instruments of the anachronistic doctrine of *descriptio personae*. This is, of course, the general rule⁵ and the case is thought worthy of mention here primarily because of a somewhat different attitude displayed by the court in the earlier decision of *Kaspar American State Bank v. Owl Homestead Association*.⁶ Although in that case the court recognized the general rule, it held such rule inapplicable because the body of the note purported to bind the "undersigned jointly and severally." The note in the present case employed, in the body, the words "I, we, or either of us." Although the same contention was raised as in the earlier case, no reference was made in the opinion to that decision.

In *Naas v. Peters*,⁷ the Illinois Supreme Court has reiterated the principle that under Section 18 of the Negotiable Instruments Act⁸ an undisclosed principal is not liable on a negotiable instrument. The instrument there involved was secured by a purchase money mortgage and, in foreclosure proceedings, a deficiency decree had been entered against both principal and agent which decree had been sustained in the Appellate Court. The Supreme Court, when reversing, distinguished the situation before it from

² See annotation in 67 A. L. R. 413 to *Scott v. People's Monthly Company*, 209 Iowa 503, 228 N. W. 263 (1929).

³ 325 Ill. App. 307, 60 N. E. (2d) 108 (1945).

⁴ Ill. Rev. Stat. 1945, Ch. 98, § 40, states: "Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized. . . ."

⁵ See Britton, *Handbook of the Law of Bills and Notes* (West Pub. Co., St. Paul, 1943), § 164.

⁶ 301 Ill. App. 326, 22 N. E. (2d) 785 (1939), noted in 18 CHICAGO-KENT LAW REVIEW 196, 28 Ill. B. J. 178.

⁷ 388 Ill. 505, 58 N. E. (2d) 530 (1944), noted in 40 Ill. L. Rev. 133, reversing 321 Ill. App. 212, 52 N. E. (2d) 817 (1944).

⁸ Ill. Rev. Stat. 1945, Ch. 98, § 38, declares: "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided."

the case of *Bride v. Stormer*⁹ in which, under somewhat similar circumstances, the undisclosed principal, a bank, was held liable on the underlying indebtedness. The court recognized the force of Section 18 in the earlier case, but seemed to predicate liability there upon a theory of money had and received, coupled with a resulting trust theory, rather than one of agency.¹⁰

Attention is also invited to the Supreme Court decision in the case of *In re Feldman's Estate*¹¹ which involved the effect of a "marginal" notation on the maturity of a promissory note. In the body of the instrument the words "on or before" had been written on the printed form and the printed word "after" stricken, so that the undertaking was to pay "on or before date." The note was dated March 1, 1931. The "marginal" notation read "Due Mar. 1, 1939," the first word being printed and the rest written in. The Appellate Court had held that the note was payable on demand, but the Supreme Court reversed and gave effect to the "marginal" notation to resolve the "ambiguity" in the body of the instrument.

INSURANCE

The Illinois Supreme Court has set at rest the controversy which existed between the first and third divisions of the First District Appellate Court over the right of a beneficiary, after death of the insured, to assign the benefits of an industrial life insurance policy.¹² By its decision in the case of *Lain v. Metropolitan Life Insurance Company*,¹³ the higher court now holds that such policies are assignable even though they contain a provision which declares that "any assignment or pledge of this policy or any part of its benefits shall be void." The presence of a so-called "facility of payment" clause likewise does not pre-

⁹ 368 Ill. 524, 15 N. E. (2d) 282 (1938).

¹⁰ For a helpful, but critical, discussion of the distinction drawn in the later case, reference is made to a note to *Naas v. Peters* in 40 Ill. L. Rev. 133.

¹¹ Sub nom. *Van Zele v. Smaltz*, 387 Ill. 568, 56 N. E. (2d) 405 (1944), reversing 320 Ill. App. 243, 50 N. E. (2d) 766 (1943). Smith, C. J., and Murphy, J., dissented. See also note in 23 CHICAGO-KENT LAW REVIEW 12.

¹² A discussion of the conflicting decisions is contained in 22 CHICAGO-KENT LAW REVIEW 269.

¹³ 388 Ill. 576, 58 N. E. (2d) 587 (1945), reversing 322 Ill. App. 643, 54 N. E. (2d) 736 (1944).

vent assignment by the named beneficiary, even though the company may have an election thereunder to pay either the named beneficiary or one of a class of other persons if the named beneficiary fails to surrender the policy within thirty days, for such clause does not prevent the beneficiary's rights from vesting. Clauses of this character were deemed objectionable on the ground of public policy. Subsequent to that holding, the Appellate Court, in *Standard Discount Company v. Metropolitan Life Insurance Company*,¹⁴ held that the election in the "facility of payment" clause was ineffective against an assignment where it did not appear that the insurance company had, in fact, exercised the election by paying the proceeds of the policy to another. Language in the Supreme Court opinion was quoted with satisfaction and the intermediate tribunal emphasized the equity of that decision in eliminating expensive probate proceedings.

Another case of first impression is to be found in *Olympia Fields Country Club v. Bankers Indemnity Insurance Company*¹⁵ wherein it was held that an insurer may be held liable for refusing to settle a case both before trial and also pending appeal for an amount within the policy limits where the trial could, and did, result in a judgment against the insured in excess of the policy. Such holding was predicated on the grounds of fraud, negligence, and bad faith. The basis of liability has been vigorously disputed where negligence alone is the gist of the action,¹⁶ but fraud and bad faith seem to be more readily accepted as imputing liability on the part of the insurer. The specific charge of bad faith in that case was that the insurer arbitrarily and unreasonably refused to compromise contrary to the advice of its attorney. Unfortunately, the opinion is not yet decisive for the case was remanded for a new trial. Upon such re-trial, a different conclusion on the law might be reached and, if the case reaches the Illinois Supreme Court, that tribunal might prefer the viewpoint obtaining in a majority of other states.¹⁷

¹⁴ 325 Ill. App. 506, 60 N. E. (2d) 445 (1945). Niemeyer, P. J., wrote a dissenting opinion.

¹⁵ 325 Ill. App. 649, 60 N. E. (2d) 896 (1945).

¹⁶ See, for example, *Hilker v. Western Automobile Ins. Co.*, 204 Wis. 1, 231 N. W. 257 (1930).

¹⁷ *Best Bldg. Co. v. Employer's Liability Assur. Corp.*, 247 N. Y. 451, 160 N. E. 911, 71 A. L. R. 1464 (1928).

Legislative change has occurred in the Insurance Code, but the amendments are of a specialized nature and not of general interest.¹⁸

QUASI-CONTRACTS

Recovery of payments made under a mistake of law has generally been denied upon the theory that no contract can be implied, either in fact or law, to support an action for restitution.¹⁹ Certainly, one who pays with full knowledge of the facts but in ignorance of their legal significance cannot complain of the consequences attached to his own neglect or mistaken assumption as to the law. When, however, he inadvertently overlooks some fact bearing on his legal liability, it is a little harsh to say that a payment so mistakenly made cannot be recovered.²⁰ Such was the holding, though, in *Western & Southern Life Insurance Company v. Brueggeman*²¹ where an insurer was denied the right to recover the proceeds of an insurance policy paid at a time when it possessed information tending to show an absence of liability although, through oversight, the effect thereof was not taken into consideration because concentration was directed on another known fact which might have affected liability. Although the holding might be said to revolve on a question of waiver, the court did use language indicating that there was no difference in the rule when applied either to persons paying with full knowledge of the facts or to those who had access to pertinent information but had overlooked the same.

SALES

A statutory provision requires that an automobile dealer issue a bill of sale to the purchaser upon the sale of a motor vehicle.²²

¹⁸ Laws 1945, p. 957, S. B. 453; *ibid.*, p. 964, S. B. 547; *ibid.*, p. 966, H. B. 691; and *ibid.*, p. 950, H. B. 712. The revised text appears in Ill. Rev. Stat. 1945, Ch. 73, §§ 737, 785, 937, 939, 1009 and 1010.

¹⁹ In *Bilbie v. Lumley*, 2 East 469 at 472, 102 Eng. Rep. 448 at 449 (1802), Lord Ellenborough, C. J., mistakenly believing that every man "must be taken to be cognizant of the law," urged that such rule had to be applied or else there would be no saying to what extent "the excuse of ignorance might not be carried."

²⁰ See *Franklin Life Ins. Co. v. Ward*, 237 Ala. 474, 187 So. 462 (1939).

²¹ 323 Ill. App. 173, 55 N. E. (2d) 719 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 275.

²² Ill. Rev. Stat. 1945, Ch. 95½, § 18.

Refusal to comply with such requirement was held sufficient, in *Fruehauf Trailer Company v. Lydick*,²³ to support an action for damages on the part of the purchaser even though the refusal was predicated on the fact that an amount remained due for work done on another automobile. It would seem, therefore, that a general common-law lien could not attach to the buyer's right to demand a bill of sale.²⁴

The operation of the Uniform Trust Receipts Act²⁵ was involved in *Commercial Credit Corporation v. Horan*²⁶ where the statute was declared to be effective to protect the rights of an entruster who had complied with the filing requirements.²⁷ In that case a judgment creditor had levied upon an automobile in the possession of one Liebold, a licensed used car dealer, and bearing Liebold's license plates, for money due from Liebold. The plaintiff claimed under a trust receipt from one Pearson who was operating as a used car dealer without license but using Liebold's premises and license. Judgment for plaintiff was affirmed when it appeared that all necessary steps to complete trust receipt operation were present. The result could be deemed harsh no matter what the outcome, but the decision effectuates the purpose of the statute and perhaps it is better policy to require the levying creditor, or any purchaser out of the usual course of business, to make full inquiry as to the question of possession.

Following the analogy that an absolute transfer with an option to repurchase will generally be held to be a mortgage,²⁸ it was held in *Chapin v. Tampoorlos*²⁹ that the documents constituting a conditional sale transaction can be made the subject of a pledge where the purpose is one to secure the repayment of a debt. The absolute character of the purported sale thereof was regarded as ineffective to constitute a true sale in view of the alleged seller's

²³ 325 Ill. App. 28, 59 N. E. (2d) 551 (1945). Leave to appeal has been denied.

²⁴ Such bill of sale is necessary, under Ill. Rev. Stat. 1945, Ch. 95½, § 77b, in order that the buyer can obtain a certificate of title on the automobile.

²⁵ Ill. Rev. Stat. 1945, Ch. 121½, § 166 et seq.

²⁶ 325 Ill. App. 625, 60 N. E. (2d) 763 (1945).

²⁷ Ill. Rev. Stat. 1945, Ch. 121½, §§ 172 and 178.

²⁸ *Behrendt v. Acocella*, 320 Ill. 308, 150 N. E. 913 (1926).

²⁹ 325 Ill. App. 219, 59 N. E. (2d) 334 (1945).

right to reacquire the pledged documents upon satisfaction of the debt.

The only appreciable change in the law of sales made during the recent session of the legislature was one which amplified the list of exempted securities sold under the terms of the so-called "Blue Sky" Law.³⁰ The amendment does not appear to have disturbed the holding in *Scully v. DeMet*.³¹

III. CIVIL PRACTICE AND PROCEDURE

Scarcely a case reaches the appellate tribunals which does not involve some issue of practice or procedure. Many of the points raised are so well-settled that it is remarkable that the higher courts reiterate established principles with such patience. Some cases do, however, involve unsettled questions of procedural law and they are here summarized and arranged in substantially the same order as they would probably occur in the conduct of litigation.

AVAILABILITY OF REMEDIES

Primary concern should always be manifested over the question of jurisdiction, particularly in the sense of the power to hear and determine, for otherwise the efforts of the practitioner may come to naught. Jurisdiction over tort cases instituted in the Municipal Court of Chicago, for example, is limited to situations wherein the amount of damage does not exceed one thousand dollars, with some small exceptions.¹ An attempt to confer jurisdiction on that court in an action based on fraud and deceit involving more than the jurisdictional limit under the guise that the claim was one arising from contract was refuted in *Fine v. Unschuld*² when it appeared that plaintiff was not relying upon any right to rescind and seek return of the consideration paid.³

³⁰ Laws 1945, p. 1323, H. B. 676; Ill. Rev. Stat. 1945, Ch. 121½, § 99.

³¹ 323 Ill. App. 74, 55 N. E. (2d) 101 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 188.

¹ Ill. Rev. Stats. 1945, Ch. 37, § 357. See also, *Malina v. Oplatka*, 304 Ill. 381, 136 N. E. 666 (1922).

² 324 Ill. App. 274, 58 N. E. (2d) 251 (1944).

³ *Arnold v. Dodson*, 193 Ill. App. 62 (1915), affirmed in 272 Ill. 377, 112 N. E. 70 (1916).

but rather sought damages predicated on the fraud perpetrated upon her.

The confusion over the jurisdiction of city courts produced by the decision in *Werner v. Illinois Central Railroad Company*⁴ has not yet abated if the decisions in two recent cases are at all indicative. Both involved claims that divorces granted by city courts were invalid for lack of jurisdiction. In one, that of *Cullen v. Stevens*,⁵ collateral attack on the divorce decree was denied because the essential facts showing lack of jurisdiction were to be found, if at all, only in the certificate of evidence. By concluding that a certificate of evidence is no part of the record open to examination on collateral attack,⁶ the court found the decree sustained by the presumption that judicial records import verity although the evidence *de hors* the record tended to indicate the opposite. In the other case, *Riddlesbarger v. Riddlesbarger*,⁷ the collateral attack was sustained, despite the apparent validity of the record in the city court proceeding, because the court found that fraud was present in inducing the city court to take jurisdiction. The court there distinguished between essential fraud at the outset, preventing the acquisition of jurisdiction,⁸ and fraud perpetrated in the course of the proceeding which would sustain a bill of review but is not open to inquiry in collateral proceedings.⁹ Although Section 5 of the Divorce Act¹⁰ has been held valid as a venue provision,¹¹ it has not enlarged the jurisdiction of city courts in divorce matters, so grave caution should be exercised before resort is had to such institutions except in cases between the residents of the city upon causes of action arising therein.

Legislative attention to questions of jurisdiction may also

⁴ 379 Ill. 559, 42 N. E. (2d) 82 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 116.

⁵ 389 Ill. 35, 58 N. E. (2d) 456 (1945). Smith, J., dissented.

⁶ *Sharp v. Sharp*, 333 Ill. 267, 164 N. E. 685 (1928), was distinguished.

⁷ 324 Ill. App. 176, 57 N. E. (2d) 901 (1944).

⁸ In re Estate of Goldberg, 288 Ill. App. 203, 5 N. E. (2d) 863 (1937). Leave to appeal denied, 288 Ill. App. xv. Cert. den., *Goldberg v. Goldberg*, 302 U. S. 693, 58 S. Ct. 12, 82 L. Ed. 535 (1937).

⁹ See *People v. Sterling*, 357 Ill. 354 at 364, 192 N. E. 229 at 233 (1934).

¹⁰ Ill. Rev. Stat. 1945, Ch. 40, § 6.

¹¹ *McFarlin v. McFarlin*, 384 Ill. 428, 51 N. E. (2d) 520 (1943).

be observed. The act to establish appellate courts has been modified so as to confer jurisdiction over appeals taken in adoption proceedings,¹² and also to permit the creation of additional branch courts whenever the business of any Appellate Court "shall warrant," rather than when the number of pending cases exceeds 250.¹³ The new branches so created may be disbanded when the need has ceased.¹⁴ Although the legislature saw fit to amend the City Courts Act so as to make it possible to create similar courts in any incorporated town superseding a civil township,¹⁵ it did nothing to clarify the meaning of the jurisdictional words "in and for" any city as used in such statute.¹⁶ An entirely new Court of Claims has, however, been established.¹⁷

Jurisdiction over the plaintiff is conferred by the mere fact of instituting suit.¹⁸ Little has been said during the year as to the equally important problem of securing jurisdiction over the defendant. One principle that has proved unusually harsh in the past has, however, now been removed by legislative action. Section 20 of the Civil Practice Act, relating to appearances, has been amended, so as to provide that a special appearance may be made either in person or by attorney and, if made by attorney, shall not be deemed to be a general appearance.¹⁹ While the statute does violence to the fundamental theory behind the use of the special appearance, it prevents rise of the claim that submission to jurisdiction has occurred because a general appearance was used when the obvious intention was not to submit.²⁰

Choice of tribunal and manner of acquiring jurisdiction having been determined, it then becomes a matter of concern to see that

¹² Laws 1945, p. 649, H. B. 220, and Laws 1945, p. 648, H. B. 810; Ill. Rev. Stat. 1945, Ch. 37, § 32.

¹³ Laws 1945, p. 646, H. B. 573; Ill. Rev. Stat. 1945, Ch. 37, § 45. Compare with Ill. Rev. Stat. 1943, Ch. 37, § 45.

¹⁴ Laws 1945, p. 647, H. B. 574; Ill. Rev. Stat. 1945, Ch. 37, §§ 52 and 54.

¹⁵ Laws 1945, p. 652, S. B. 190; Ill. Rev. Stat. 1945, Ch. 37, § 333 et seq. It is believed that only the Town of Cicero could take advantage of this amendment.

¹⁶ Problems evoked by *Werner v. Illinois Central Railroad Co.*, 379 Ill. 559, 42 N. E. (2d) 82 (1942), have not, therefore, been resolved by legislative action.

¹⁷ Laws 1945, p. 660, S. B. 462; Ill. Rev. Stat. 1945, Ch. 37, § 439.1 et seq.

¹⁸ *Wilson Bros. v. Haeger*, 347 Ill. 140, 179 N. E. 459 (1932).

¹⁹ Laws 1945, p. 1148, H. B. 215; Ill. Rev. Stat. 1945, Ch. 110, § 144.

²⁰ See, for example, *Consolidated Gasoline Co. v. Lexow*, 316 Ill. App. 257, 44 N. E. (2d) 927 (1942).

the action is promptly instituted. In order to prevent the running of the statute of limitations it has generally been regarded as necessary that a suit not only be instituted in apt time but also that it be filed in a court having jurisdiction to entertain such a cause. Statutes exist, however, which purport to permit the transfer of cases filed in the wrong court to the proper court or county in which the same should have been instituted.²¹ A statute of that character had been held ineffective by the Illinois Supreme Court to save a case instituted in apt time but in a court lacking jurisdiction if the transfer did not occur within the applicable period of limitation.²² Upon certiorari to the United States Supreme Court because a cause of action based on a federal statute was involved, that court held in *Herb v. Pitcairn*²³ that, so far as the federal statute of limitations was concerned, the action had been instituted in apt time provided there was a state statute calling for change of venue to a court that had jurisdiction.²⁴

Differences in the prevailing period of limitation applying to written and oral contracts²⁵ produced a dispute in *Novosk v. Reznick*²⁶ as to the time within which a third-party beneficiary must sue when the contract which is the foundation of his right of action is in writing but does not expressly name the beneficiary. By applying the rule that if a contract is only partly reduced to writing, so that parol proof must be resorted to in order to show with whom the bargain has been made, then the shorter period applies,²⁷ the court concluded that the unnamed

²¹ Ill. Rev. Stat. 1945, Ch. 146, § 36.

²² *Herb v. Pitcairn*, 384 Ill. 237, 51 N. E. (2d) 277 (1943), noted in 32 Ill. B. J. 347.

²³ — U. S. —, 65 S. Ct. 954, 89 L. Ed. (adv.) 931 (1945), noted in 23 CHICAGO-KENT LAW REVIEW 341. See an earlier aspect of the case in — U. S. —, 65 S. Ct. 459, 89 L. Ed. (adv.) 481 (1945), noted in 33 Ill. B. J. 238.

²⁴ It is understood that, upon return of the mandate, the Illinois Supreme Court re-examined the problem, came to the conclusion that the city court in which the action had been instituted possessed a special and limited jurisdiction to grant transfer, hence found the suit was started in sufficient time in a court possessing jurisdiction so not barred by any statute of limitation. See opinion, case No. 27275-6, not yet reported.

²⁵ Compare Ill. Rev. Stat. 1945, Ch. 83, § 16 with *ibid.*, § 17.

²⁶ 323 Ill. App. 544, 56 N. E. (2d) 318 (1944).

²⁷ *Railway P. & F. Conductors' Mut. Aid & Ben. Ass'n v. Loomis*, 142 Ill. 560, 32 N. E. 424 (1892).

third-party beneficiary was obligated to sue within five years rather than ten.

It is fundamental law that the plaintiff must not only be a person entitled to complain but must also be one entitled to sue in the capacity in which he names himself. If he sues in a representative capacity, he must measure up to the requirements laid down in *Hansberry v. Lee*.²⁸ In two such cases arising during the year, Illinois courts were obligated to resolve questions on this score. In *Newberry Library v. Board of Education*,²⁹ the Illinois Supreme Court held that a holder of bonds, part of a single issue, could not make his action *res adjudicata* as to the other holders merely by asserting that he sued in their behalf, for it was there decided the several holders did not constitute a common class. The Appellate Court, in *Hintze v. Allen*,³⁰ went even farther when it dismissed a representative suit by certain property owners which sought to nullify restrictive covenants in deeds to lots in a particular subdivision. It held that as no common interest existed³¹ a decree nullifying or modifying the restrictions would affect the interests of persons not served with process and would deny to them the due process required by both state and federal constitutions.³² A practice which had become fairly common prior to the decision in the *Hansberry* case, that of casting many forms of litigation over private rights into class suits not only to bind the other members of the class but also to force them to contribute to the cost, seems now definitely headed for elimination.³³

Suits by taxpayers to enjoin expenditure of public funds, on the other hand, are not uncommon and any person so suing as the

²⁸ 311 U. S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940), noted in 19 CHICAGO-KENT LAW REVIEW 69, 20 *ibid.*, p. 76, 26 Corn. L. Q. 317, 39 Mich. L. Rev. 829, 89 U. of Pa. L. Rev. 525, reversing 372 Ill. 369, 24 N. E. (2d) 37 (1939), noted in 35 Ill. L. Rev. 213, 7 U. of Chi. L. Rev. 563.

²⁹ 387 Ill. 85, 55 N. E. (2d) 147 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 82, 43 Mich. L. Rev. 413.

³⁰ 326 Ill. App. 182, 61 N. E. (2d) 259 (1945).

³¹ See *Otto v. Alexander*, 383 Ill. 482, 50 N. E. (2d) 511 (1943).

³² Ill. Const. 1870, Art. II, § 2; U. S. Const., 14th Amend.

³³ It had even been the practice to use the representative suit as a basis for enjoining others from asserting their individual rights. That practice was nullified by *Peoples Store of Roseland v. McKibben*, 379 Ill. 148, 39 N. E. (2d) 995 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 23.

representative of all taxpayers is generally regarded as a proper party plaintiff.³⁴ Attempts were made, in *Krebs v. Thompson*,³⁵ to affix qualifications to that doctrine to the effect that (1) no taxpayer could sue to enjoin expenditures under an allegedly unconstitutional statute unless he was also a person upon whom the statute would directly operate, and (2) could show that the income arising therefrom would be less than the cost of administering the act. Neither contention was upheld.

Not only is a proper plaintiff necessary to every suit but the defendant must also be a person capable of being sued. There has been no change in the common-law rule that an unincorporated voluntary association cannot be sued by its association name for it is neither a natural nor an artificial person.³⁶ Dicta in *Vischer v. Dow Jones & Co., Inc.*,³⁷ however, would seem to indicate that a business trust organized under a Massachusetts statute could be sued as an entity in the courts of this state for the reason that the enabling act fixed upon it the power to sue and be sued.³⁸ No similar statute is to be found in Illinois, hence suits against business trusts formed here should follow the common-law pattern.³⁹

There is little to say on the subject of choosing an appropriate remedy, for no change has occurred in established doctrines regulating suits at law. Fundamental distinctions do still exist between legal and equitable actions,⁴⁰ however, even though distinctions in the manner of pleading between them have been abolished.⁴¹ As a consequence, a person may not prosecute a suit in equity if he possesses an adequate remedy at law. The holding in *Webster v. Hall*,⁴² though, is rather unusual for the court

³⁴ *Fergus v. Russell*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B 1120 (1915). The court there indicated that it did not regard the question "as any longer an open one."

³⁵ 387 Ill. 471, 56 N. E. (2d) 761 (1944).

³⁶ *Kingsley v. Amalgamated Meat Cutters, etc.*, 323 Ill. App. 353, 55 N. E. (2d) 554 (1944).

³⁷ 325 Ill. App. 104, 59 N. E. (2d) 884 (1945).

³⁸ Motion to dismiss for lack of jurisdiction was sustained because process was not served upon the trustee who is declared to be the statutory agent of the trust: 325 Ill. App. 104 at 122, 59 N. E. (2d) 884 at 892.

³⁹ See *Schumann-Heink v. Folsom*, 328 Ill. 321, 159 N. E. 250, 58 A. L. R. 485 (1927).

⁴⁰ Ill. Rev. Stat. 1945, Ch. 110, § 259.10.

⁴¹ *Ibid.*, Ch. 110, § 155.

⁴² 388 Ill. 401, 58 N. E. (2d) 575 (1945), noted in 33 Ill. B. J. 309.

therein affirmed a decree dismissing a suit for want of equity because an adequate legal remedy existed when it would have been expected that the decision should have been to transfer the case to the law side of the docket.⁴³ It is true that the plaintiff therein made no request for such transfer, apparently believing that he did possess an equitable right to recover, so the case cannot be construed as refuting the clear direction of the statute. Had plaintiff refused to permit the proffered transfer, the court would have had no alternative but to dismiss the suit.⁴⁴

One new statutory remedy has been provided. A long-felt need in the procedural law of this state has at last been satisfied by the enactment of a statute permitting courts to pronounce declaratory judgments.⁴⁵ Modelled somewhat after the federal act,⁴⁶ the Illinois statute is available for use only where the declaratory judgment will serve to terminate the controversy, but in such situations the judgment may be given enforceable effect if necessary. Until a body of precedent interpreting the use of the act in this state has been accumulated, it is likely that the practitioner will be obliged to go afield to find persuasive authority on doubtful points.⁴⁷

Fullest efficacy to a proceeding in equity has heretofore been provided through the doctrine of *lis pendens* by which a person dealing with the subject matter after suit has been instituted must take the same *cum onere*. There are implications in *Cairo Lumber Company, Incorporated v. Corwin*,⁴⁸ though, that such doctrine has ceased to possess full vitality in this state for it was

⁴³ Ill. Rev. Stat. 1945, Ch. 110, § 168(2).

⁴⁴ *Barger v. First Nat. Bank of Danville*, 310 Ill. App. 628, 35 N. E. (2d) 556 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 97.

⁴⁵ Laws 1945, p. 1149, H. B. 217; Ill. Rev. Stat. 1945, Ch. 110, § 181.1.

⁴⁶ 28 U. S. C. A. § 400.

⁴⁷ Textual treatment of the subject may be found in Borchard, *Declaratory Judgments* (Cleveland: Banks-Baldwin Law Pub. Co., 1941), 2d Ed., and Anderson, *Actions for Declaratory Judgments* (St. Paul: West Pub. Co., 1940). Serviceable law review articles appear in 29 Ill. L. Rev. 1 and 174, 33 Col. L. Rev. 648, 20 Corn. L. Q. 1, and 11 Tenn. L. Rev. 217. The Uniform Declaratory Judgments Act, with annotations, is set forth in 9 U. L. A. 215 et seq. It is to be regretted that the proponents of the new legislation did not follow the action of twenty-six other states in using the uniform act as a model.

⁴⁸ 325 Ill. App. 319, 60 N. E. (2d) 110 (1945).

there indicated that Section 53 of the Chancery Act⁴⁹ has been repealed, at least by implication if not expressly, by reason of language contained in Section 76 of the Civil Practice Act.⁵⁰ In that case, a purchaser at private sale took title to land which had been the subject of a creditor's suit subsequent to a decree dismissing the suit but while the case was pending on appeal. After the purchase, the decree was reversed in favor of the creditor. It was held that the interim sale to a bona-fide purchaser had to be protected since the appeal had not been made to operate as a supersedeas. It is a little strained to say that Section 53 of the Chancery Act has been repealed when the history thereof shows that it was amended by the legislature subsequent to the adoption of the Civil Practice Act section referred to,⁵¹ and as an appeal constitutes a continuation of the same suit⁵² it would seem as though the original *lis pendens* notice should continue in effect until the ultimate determination thereof. While the language of the Civil Practice Act would seem to protect the rights of purchasers after decree and before reversal, whether at public or private sale,⁵³ the obvious intention thereof would seem to be to provide protection for purchasers from judgment or decree creditors who, in the absence or reversal of the decree, would have no title to convey. Permitting a sale by the original owner to be treated as valid, despite the notice provided by virtue of *lis pendens*, because the creditor's suit is dismissed for want of equity and he has not had time to convert his appeal into a supersedeas is gratuitously favoring one who, by later reversal, is shown to be a party to a fraud or claiming under such a person.⁵⁴

PREPARATION OF PLEADINGS

The pleader was formerly required to state different breaches of duty in separate counts to avoid the charge that he had been

⁴⁹ Ill. Rev. Stat. 1945, Ch. 22, § 53.

⁵⁰ *Ibid.*, Ch. 110, § 200(1).

⁵¹ The Chancery Act was amended by Laws 1935, p. 247, while the essential language of the Civil Practice Act, § 200(1), has been in existence since Laws 1933, p. 806, even though the section has been amended in other respects since then.

⁵² Ill. Rev. Stat. 1945, Ch. 110, § 198(1).

⁵³ The court held that Ill. Rev. Stat. 1945, Ch. 110, § 200(1), was not confined in operation to judicial sales: 325 Ill. App. 319 at 324, 60 N. E. (2d) 110 at 113.

⁵⁴ In *Herrington v. McCollum*, 73 Ill. 476 (1874), the purchaser was protected be-

guilty of duplicity.⁵⁵ That rule was changed at the time of the adoption of the Civil Practice Act,⁵⁶ so it was held proper in *Winn v. Underwood*⁵⁷ to incorporate in one count two or more causes of action growing out of violations of the same statute provided the same arose from the one transaction.⁵⁸ The court did indicate, however, that if the wrongs were committed by several defendants acting jointly and one of them had died in the meantime, then it would be better practice to state the causes of action against the survivors in one count and present a separate count to cover the case against the administrator of the deceased wrongdoer since a separate and different type of judgment would be necessary against the latter.⁵⁹

An excellent illustration for the use of alternative pleadings⁶⁰ is provided by *People ex rel. Ray v. Lewistown Community High School District*,⁶¹ wherein the plaintiff filed a complaint in the nature of quo warranto containing several counts under some of which he charged that the school district usurped powers not belonging to it while under other counts he alleged that the individual members of the board unlawfully assumed to exercise the powers of a school district. Defendants contended that, having acknowledged the existence of the school district under certain of the counts, plaintiff could not also claim that it had not been validly organized. While quo warranto proceedings were originally exempted from the operation of the Civil Practice Act,⁶² the present statute controlling the use thereof assimilates the practice therein to that used in other civil proceedings.⁶³ It was,

cause no action was taken to revive the dismissed action for two years. *Smith v. Herdlicka*, 323 Ill. 585, 154 N. E. 414 (1926), involved an even longer delay. They do not present situations similar to the instant case. If the original suit can be said to be pending in any respect, *Jackson v. Warren*, 32 Ill. 331 (1863), the lis pendens notice still possesses vitality.

⁵⁵ *Chicago West Division Ry. Co. v. Ingraham*, 131 Ill. 659, 23 N. E. 350 (1890).

⁵⁶ Ill. Rev. Stat. 1945, Ch. 110, § 259.12.

⁵⁷ 325 Ill. App. 297, 60 N. E. (2d) 116 (1945).

⁵⁸ *Randall Dairy Co. v. Pevely Dairy Co.*, 278 Ill. App. 350 (1935), was distinguished on the ground that the several causes there concerned grew out of wholly unrelated transactions.

⁵⁹ Ill. Rev. Stat. 1945, Ch. 110, § 157 and § 174.

⁶⁰ *Ibid.*, Ch. 110, § 167(2).

⁶¹ 388 Ill. 78, 57 N. E. (2d) 486 (1944).

⁶² Ill. Rev. Stat. 1945, Ch. 110, § 125.

⁶³ *Ibid.*, Ch. 112, § 15.

therefore, held not only proper but necessary to use alternative pleading so as to get all proper parties before the court.⁶⁴ Tacit admissions in one aspect of the suit were held not to control the determination of the other, although they were binding in the part of the case in which they were made.⁶⁵

A reminder to the pleader to attach to his complaint any exhibits on which he relies is to be found in *Morris v. Goldthorp*.⁶⁶ The court there stated that an additional reason for Section 36 of the Civil Practice Act⁶⁷ lies in the fact that the court might need such exhibits in order to pass upon a motion to dismiss. It accordingly gave the section mandatory effect.

Little has been said about defensive pleadings. In *Hunsley v. Aull*,⁶⁸ however, the court held that since alternative pleading is permitted, it is not unfair to require the defendant to state all possible theories to sustain his defense so as to apprise his opponent of the claims he will or may rely upon. Failure to assert a possible defense in the answer was, as a consequence, taken as ground for precluding the party from the advantage thereof even though its existence appeared from the evidence. That ruling might seem harsh were it not for the fact that no request was made to permit the filing of an amended answer so as to have the pleadings conform to the proof.⁶⁹

In an ordinary civil action, failure to file a reply denying an affirmative defense contained in an answer will usually result in the plaintiff being deemed to have admitted the defensive matter.⁷⁰ It was argued, in *Firke v. McClure*,⁷¹ that such rule did not apply to ejectment proceedings, particularly where defendant had filed the general denial permitted therein,⁷² on the ground

⁶⁴ Although the respective claims constituted separate suits, they were held properly joined in one action since they arose out of the same transaction or series of transactions: Ill. Rev. Stat. 1945, Ch. 110, § 148.

⁶⁵ *People ex rel. Weber v. City of Spring Valley*, 129 Ill. 169, 21 N. E. 843 (1889).

⁶⁶ 390 Ill. 186, 60 N. E. (2d) 857 (1945).

⁶⁷ Ill. Rev. Stat. 1945, Ch. 110, § 160.

⁶⁸ 387 Ill. 520, 56 N. E. (2d) 773 (1944).

⁶⁹ Ill. Rev. Stat. 1945, Ch. 110, § 170(3).

⁷⁰ *Ibid.*, Ch. 110, § 164(2). But see *Snively v. Crownover*, 321 Ill. App. 292, 53 N. E. (2d) 7 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 27.

⁷¹ 389 Ill. 543, 60 N. E. (2d) 220 (1945).

⁷² Ill. Rev. Stat. 1945, Ch. 45, § 19.

that affirmative pleadings are there unnecessary. The court held, however, that if affirmative pleadings are used they have the same effect as in other civil suits by reason of the fact that the practice and procedure in ejectment is similar to that found in other actions.⁷³

THE TRIAL OF THE CASE

Although technical rules of evidence have gone unchanged,⁷⁴ one point respecting the manner of obtaining proof was dealt with by the courts and one by the legislature. The trial court, in *Boettcher v. Howard Engraving Company*,⁷⁵ struck defensive pleadings and entered judgment by default for failure to make discovery upon interrogatories propounded by the other party. That action purported to have support in a rule of court.⁷⁶ The higher court declared the rule invalid for want of statutory authority,⁷⁷ as well because it would violate constitutional rights to due process, to enter judgment without a hearing.⁷⁸ The remedy seems rather to be in punishment for contumacy.⁷⁹ Where documentary evidence is sought, it is no longer necessary to procure an order of court before subpoena *duces tecum* may issue by reason of a brief addition to Section 62 of the Civil Practice Act.⁸⁰

While the actual trial is usually conducted before a judge, the practice in equity permits a hearing before the master or his substitute, to-wit: a special commissioner. An interesting point has been raised in the case of *Simpson v. Harrison*,⁸¹

⁷³ *Ibid.*, Ch. 45, § 10.

⁷⁴ Attention is directed to *Moscow v. Mutual Life Ins. Co.*, 387 Ill. 378, 56 N. E. (2d) 399 (1944), dealing with the subject of judicial notice of foreign law, noted post, p. 68.

⁷⁵ 389 Ill. 75, 58 N. E. (2d) 866 (1945).

⁷⁶ Rule 20½ of the Superior Court of Cook County, adopted May 1, 1944, declares that if a party fails to comply, the court may strike that person's pleadings and "enter a judgment by default against that party."

⁷⁷ While Ill. Rev. Stat. 1945, Ch. 110, § 182, provides for discovery, it attaches no penalty for failure or refusal to make disclosure.

⁷⁸ *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 95 N. E. 462 (1911).

⁷⁹ See *Sibbach v. Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1941).

⁸⁰ Laws 1945, p. 1150, H. B. 209; Ill. Rev. Stat. 1945, Ch. 110, § 186. Hitherto, such an order was necessary: Ill. Rev. Stat. 1945, Ch. 51, § 9. The latter statute does not appear to have been repealed.

⁸¹ 389 Ill. 588, 60 N. E. (2d) 104 (1945).

although it has not yet been decided,⁸² concerning the right of a court of equity to appoint a special commissioner to take proofs and make findings of fact and recommendations based thereon. The argument against the validity of the appointment of a special commissioner proceeds on the theory that the general power of appointment which heretofore existed⁸³ was repealed at the time of the enactment of the Civil Practice Act⁸⁴ and the only authority presently permitting the use of a special commissioner, except in special instances,⁸⁵ requires that it appear that the regularly constituted master in chancery be disqualified or unable to act or his position be vacant.⁸⁶ The practice of making frequent use of special commissioners, such as has been indulged in in some counties, may be checked if the argument is sustained.

After the evidence is in, a litigant may find it necessary to take a voluntary non-suit. Before he does so, he should exercise caution as once the action has been taken he cannot retract according to *Fulton v. Yondorf*.⁸⁷ If he does erroneously dismiss his case as to one of several defendants he cannot, merely by motion to vacate the dismissal order, reinstate the cause as to such defendant but must begin his action anew⁸⁸ or else file an amended complaint and have new process issued to reacquire jurisdiction over the individual.⁸⁹ The right to take a voluntary nonsuit is also circumscribed by statute⁹⁰ which places limitations thereon after "trial or hearing begins." It was held, in *Bernick v. Chicago Title & Trust Company*,⁹¹ that after hearing had on a motion to dismiss on the ground of res adjudicata,⁹² although no decision

⁸² The cause was ordered transferred to the Appellate Court for the First District on the ground that no freehold was involved. That court has not yet announced any decision on the question.

⁸³ Cahill, Ill. Rev. Stat. 1931, Ch. 22, § 39.

⁸⁴ Ill. Rev. Stat. 1945, Ch. 110, § 218. See Laws 1933, p. 812.

⁸⁵ See Ill. Rev. Stat. 1945, Ch. 40, § 16, and Ch. 68, § 22.

⁸⁶ *Ibid.*, Ch. 90, § 5.

⁸⁷ 324 Ill. App. 452, 58 N. E. (2d) 640 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 327. A comparable situation appears in *Bettenhausen v. Guenther*, 388 Ill. 487, 58 N. E. (2d) 550 (1945).

⁸⁸ The former practice is illustrated by *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 112 N. E. 350 (1916).

⁸⁹ *Thompson v. Otis*, 285 Ill. App. 523, 2 N. E. (2d) 370 (1936), indicates the procedural steps which should be taken.

⁹⁰ Ill. Rev. Stat. 1945, Ch. 110, § 176.

⁹¹ 325 Ill. App. 495, 60 N. E. (2d) 442 (1945).

⁹² Ill. Rev. Stat. 1945, Ch. 110, § 172(1) (e).

had been pronounced thereon, it was too late to take a voluntary nonsuit for the reason that the word "hearing" as used in the statute had a non-technical meaning.

The scope and purpose of a motion in arrest of judgment is considered in an ample opinion of the Appellate Court in *Scott v. Freeport Motor Casualty Company*.⁹³ The operation and effect of that decision is far too lengthy a subject to be treated in the compass of a survey such as this, so no attempt is made to do so. Close attention thereto, and to the decision of the Supreme Court on leave to appeal,⁹⁴ is invited.

Hitherto, only one judgment was permitted in any law action even though defendant might have admitted the justice of part of plaintiff's claim.⁹⁵ The authority to grant more than one judgment in the same case was conferred on the courts by Section 50(1) of the Civil Practice Act,⁹⁶ but analysis of the operation of that section had to await the decision in *Zimmerman v. Bankers Life & Casualty Company*.⁹⁷ Separate judgments were there upheld against the claim that satisfaction of the first judgment operated to bar recovery on the disputed part of plaintiff's claim. A word of caution is there expressed, however, as to the necessity for adequate showing, at the time of the rendition of the first judgment, of an intention to reserve jurisdiction as to the balance of the claim.

DAMAGES

While rules and doctrines relating to proximate cause are used mainly to determine whether liability exists at all, they may also be used in deciding questions of damage law for the defendant's wrongful conduct must have been a substantial factor in

⁹³ 324 Ill. App. 529, 58 N. E. (2d) 618 (1945).

⁹⁴ It is understood that, upon leave to appeal granted, the Illinois Supreme Court reversed the decision of the Appellate Court and sustained the action of the trial court. Opinion in case No. 28746, not yet reported.

⁹⁵ *Brewer v. Christian*, 9 Ill. App. 57 (1881).

⁹⁶ Ill. Rev. Stat. 1945, Ch. 110, § 174(1).

⁹⁷ 324 Ill. App. 370, 58 N. E. (2d) 267 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 252.

producing the given result for which compensation is sought.⁹⁸ Where the harm suffered by plaintiff is caused by an error of judgment on the part of a third person not encompassed within the meaning of "proximate cause," therefore, the defendant cannot be held responsible for such harm. For that reason, it was held error in *Leech v. Newell*⁹⁹ to permit the introduction of evidence that plaintiff, after injury in an automobile accident, was confined for psychopathic examination upon a complaint made by a third person when it later developed that plaintiff was not insane nor had been rendered so by defendant's negligent conduct. The third person's act was said to be an intervening cause so as to absolve defendant from any harmful consequences flowing therefrom. Had defendant's carelessness produced insanity in the victim, a different result might have followed.¹

The adequacy of the amount of damage awarded in a wrongful death action was considered in the case of *Wallace v. City of Rock Island*² wherein the jury fixed the measure of recovery for the wrongful death of a thirteen-year old boy at \$500. While the statute provides for the recovery of damages based on the "pecuniary injuries resulting from death,"³ the damages are not limited to the recovery of the present loss of money but may include prospective advantages of a pecuniary nature.⁴ Verdicts for the maximum statutory amount have been upheld in the case of death of infants.⁵ In the light thereof, the Appellate Court held the verdict was for no more than nominal damage and hence had to be set aside.

The rule to be applied in measuring the damage growing out of the deprivation of use of a vehicle was seriously examined in *Frenhauf Trailer Company v. Lydick*⁶ where, after rehearing, it was decided that although the plaintiff is generally obliged to

⁹⁸ See McCormick, Handbook on the Law of Damages (St. Paul: West Pub. Co., 1935), pp. 260-1.

⁹⁹ 323 Ill. App. 510, 56 N. E. (2d) 138 (1944).

¹ See Restatement, Torts, § 455.

² 323 Ill. App. 639, 56 N. E. (2d) 636 (1944).

³ Ill. Rev. Stat. 1945, Ch. 70, § 2.

⁴ Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 N. E. 246 (1907).

⁵ Deming v. City of Chicago, 321 Ill. 341, 151 N. E. 886 (1926).

⁶ 325 Ill. App. 28, 59 N. E. (2d) 551 (1945). Leave to appeal has been denied.

minimize damage that rule would not be strictly applicable. The court indicated that the measure of the loss of use could either be figured in terms of the loss of use of plaintiff's own trailer or in terms of the rental value of another one obtained in the open market. The two modes of measurement, therefore, appear to be interchangeable.

A trespasser who removes property from the land of another is entitled to no credit for his expense in so doing and must pay the value of the property so removed in its enhanced, rather than its original, condition.⁷ Where a dispute exists as to the right of removal and injunction proceedings are begun to test that right, however, the court acquires jurisdiction of the property and may validly authorize the receiver to incur necessary expense to avoid more serious loss. If, instead of the appointment of a receiver, the parties stipulate that the defendant may continue with the work provided he deposits the proceeds in court to await the final outcome of the controversy, then the expense of further operations may be charged against such fund, according to *Superior Oil Company v. Somers Drilling Company*,⁸ even though it subsequently develops that defendant was a trespasser in fact. An attempt to have the federal court reject the local rule which makes even a good-faith trespasser forfeit his expenses was rejected despite the argument that such rule is unsound and based on an erroneous understanding of English precedents.⁹

Damage inflicted upon the person whose property is taken by exercise of the power of eminent domain has customarily been restricted to the market value of the property taken at the time of seizure. When the property taken constitutes the tenant's use of real property held under a lease, the measure of recovery, according to *United States v. General Motors Corporation*,¹⁰ may be varied to include such items as the cost of removal, including

⁷ *Sikes v. Moline Consumers' Co.*, 293 Ill. 112, 127 N. E. 342 (1920).

⁸ 143 F. (2d) 49 (1944).

⁹ On this point, see opinion of Lindley, D. J., in *Superior Oil Co. v. Harsh*, 50 F. Supp. 358 (1943).

¹⁰ 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. (adv.) 379 (1945), modifying 140 F. (2d) 873 (1944), noted in 13 Geo. Wash. L. Rev. 242, 39 Ill. L. Rev. 420, 23 Texas L. Rev. 402, and 31 Va. L. Rev. 539.

labor, materials and transportation, as well as the value of fixtures and permanent equipment destroyed or depreciated by the taking. Whether or not the tenant is entitled to receive compensation for the partial use taken on the same basis as he is left under an obligation to his lessor is an entirely different question.¹¹ Since he is entitled to only the "market value" of the portion of the term taken, the measure thereof may be calculated on a different basis than that used in the tenant's lease.

APPEAL AND APPELLATE PROCEDURE

Most of the procedural difficulties have been connected with the task of securing review of *nisi prius* decisions.¹² Section 77 of the Civil Practice Act¹³ authorizes review of the action of a trial court in granting a new trial under the guise of declaring such an order to be a "final" one when, in fact, it is far from such. The obvious purpose of the statute is to save the litigants from the expense and burden of a new trial if one would be improper. Action by the Appellate Court upon appeal from an order granting a new trial is not subject to direct review by the Supreme Court though, according to *Kavanaugh v. Washburn*,¹⁴ for the order concerned is not intrinsically a final one upon which further review is immediately possible before the higher court¹⁵ despite the classification given to it by the legislature. The only way by which the matter may receive final review, as indicated therein, is for the litigant to return to the lower court with the mandate granted upon the limited appeal¹⁶ and, after final disposition there, proceed to carry the case again through all phases of appellate review. That course of procedure, the court noted,

¹¹ Mr. Justice Douglas, in his concurring opinion to *United States v. General Motors Corp.*, indicated that in his opinion an award for less than the rental imposed under the lease would not constitute "just compensation" within the meaning of U. S. Const., Amend. V.

¹² See discussion of the subject of judicial review in adoption matters in 23 CHICAGO-KENT LAW REVIEW 233, and comment on *Ekendahl v. Svolos*, 388 Ill. 412, 58 N. E. (2d) 585 (1945), post p. 46.

¹³ Ill. Rev. Stat. 1945, Ch. 110, § 201.

¹⁴ 387 Ill. 204, 56 N. E. (2d) 420 (1944).

¹⁵ Ill. Rev. Stat. 1945, Ch. 110, § 199.

¹⁶ That mandate, according to the court, should require no more than that the trial court should proceed in due course: 387 Ill. 204 at 212, 56 N. E. (2d) 420 at 423.

is "involved and confusing," but it is said to be the only one available at present. To the argument that, when the case again comes before the Appellate Court, that court would consider itself bound by the action taken upon appeal from the order granting a new trial, it was said that the mere similarity of questions in the two appeals should not be deemed conclusive so as to warrant dismissing the second appeal.

The time for taking an appeal as a matter of right has been fixed by Section 76 of the Civil Practice Act.¹⁷ If a motion is made in the trial court to vacate the judgment or decree, a problem will arise as to whether the period of time is to be measured from the date of the original judgment or from the time of the ruling on such motion. An intimation in an earlier case¹⁸ that the pendency of a motion to vacate does not operate to stay the running of the time for appeal was clarified in *Corwin v. Rheims*.¹⁹ The court there held that if, subsequent to the motion to vacate but before the ruling thereon, the party files a notice of appeal he waives his earlier motion so as to make the judgment a final and appealable one from the time of its original rendition, but that if he does not serve notice of appeal until after the ruling on his motion to vacate then the period is to be calculated from the date of such ruling, the judgment being treated as suspended until that time.

The time for taking steps subsequent to notice of appeal is also the subject of regulation. While not a question of jurisdictional significance,²⁰ compliance with such regulations will be necessary or the appeal may be dismissed. Emphasis was given to that proposition by the decision in *People ex rel. McWard v. Wabash Railroad Company*²¹ where it was held that an appeal ought properly be dismissed if the report of proceedings in the trial court is not filed within fifty days after appeal has been

¹⁷ Ill. Rev. Stat. 1945, Ch. 110, § 200.

¹⁸ See *Diebler v. Bernard Bros., Inc.*, 385 Ill. 610, 53 N. E. (2d) 450 (1944).

¹⁹ 390 Ill. 205, 61 N. E. (2d) 40 (1945), noted in 23 CHICAGO-KENT LAW REVIEW 326.

²⁰ See note to *Lukas v. Lukas*, 381 Ill. 429, 45 N. E. (2d) 869 (1943), in 21 CHICAGO-KENT LAW REVIEW 247.

²¹ 388 Ill. 312, 57 N. E. (2d) 851 (1944).

perfected or within any proper enlargement of that time.²² The fact that several appeals are consolidated does not change the rule as it applies to each particular appellant, nor does the fact that one of the appellants in the consolidated cause served notice of appeal at a later date than the others. The same case also indicates that there can be no extenuating circumstance for failure to comply with these rules. Matters of that character can only be offered to support a petition for leave to appeal. In a companion case, that of *People ex rel. McWard v. Chicago & Illinois Midland Railway Company*,²³ the court refused to enlarge on the liberality it had previously shown on the subject of non-compliance with rules regulating the contents of the appellate brief.²⁴

Rule 34 of the Supreme Court²⁵ requires that a copy of the notice of appeal be served "upon each party . . . who would be adversely affected" by any reversal or modification of the order, judgment or decree sought to be reviewed. Such rule is clearly inapplicable as to any person who could not be affected by the review other than in some beneficial fashion, so motion to dismiss an appeal for failure to serve notice on such a person was held properly denied in *Toman v. Tufts*.²⁶

When the two former methods for obtaining appellate review were abolished and statutory appeal was provided as a substitute, the Supreme Court wisely adopted a rule which permitted the appellate tribunal to entertain the cause even though an incorrect method had been pursued to bring the case before it.²⁷ The decision in *Kamienski v. Bluebird Air Service, Incorporated*,²⁸ confines the operation of that rule to cases where appeal is available as a matter of right. If, as in that case, appellate

²² Ill. Rev. Stat. 1945, Ch. 110, § 259.36.

²³ 388 Ill. 325, 57 N. E. (2d) 853 (1944).

²⁴ Ill. Rev. Stat. 1945, Ch. 110, § 259.39. See also *Swain v. Hoberg*, 380 Ill. 442, 44 N. E. (2d) 38 (1942), reversing 312 Ill. App. 610, 38 N. E. (2d) 966 (1942), noted in 20 CHICAGO-KENT LAW REVIEW 264.

²⁵ Ill. Rev. Stat. 1945, Ch. 110, § 259.34.

²⁶ 323 Ill. App. 516, 56 N. E. (2d) 135 (1944).

²⁷ Ill. Rev. Stat. 1945, Ch. 110, § 259.28. See also *In re Petition of Ekendahl*, 321 Ill. App. 457, 53 N. E. (2d) 302 (1944).

²⁸ 389 Ill. 462, 59 N. E. (2d) 853 (1945).

review is a matter of grace²⁹ and can be obtained only on the granting of leave to appeal, improvident use of a writ of error will not save the case. To give the rule in question the effect claimed by the appellant therein would deprive the higher court of its discretion on the question of whether to grant leave to appeal or not.

An appeal does not presently operate as a supersedeas, unless bond is given in conformity with Section 82 of the Civil Practice Act,³⁰ so the judgment or decree creditor is entitled to enforce the same even though appeal is pending. The fact that the debtor, unable or unwilling to seek supersedeas, satisfies the judgment or decree by compulsion while the appeal is pending does not operate to render the matter moot according to *First National Bank of Jonesboro v. Road District No. 8, Union County*³¹ where it was deemed error to dismiss an appeal for that reason. Should the judgment or decree be reversed, titles acquired under the erroneous judgment or decree will be divested at least as between the parties to the proceeding³² and rights to restitution for money paid will then arise.

While supersedeas may operate to stay the enforcement of an ordinary judgment, the same thing is not true of a judgment rendered in certiorari proceedings for such judgments are self-executing and have operated effectively immediately upon pronouncement unless subsequently reversed. A motion in *People ex rel. Barry v. Gregory*³³ that the appeal there taken be made to operate as a supersedeas was denied on the ground that the provisions of the Civil Practice Act on the subject³⁴ do not constitute such a special statute as would be necessary to change

²⁹ Appellant sought review in the Supreme Court of a decision by the Appellate Court, 321 Ill. App. 340, 53 N. E. (2d) 131 (1944). Further review was possible only pursuant to Ill. Rev. Stat. 1945, Ch. 110, § 199(2).

³⁰ Ill. Rev. Stat. 1945, Ch. 110, § 206.

³¹ 389 Ill. 156, 58 N. E. (2d) 884 (1945), reversing 322 Ill. App. 293, 54 N. E. (2d) 847 (1944).

³² *Ure v. Ure*, 223 Ill. 454, 79 N. E. 153, 114 Am. St. Rep. 336 (1906); *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449 (1851). Ill. Rev. Stat. 1945, Ch. 110, § 200 and Ch. 77, § 35a serve to protect the rights of persons not parties thereto.

³³ 324 Ill. App. 614, 59 N. E. (2d) 106 (1944).

³⁴ Ill. Rev. Stat. 1945, Ch. 110, § 206.

the general rule as it relates to certiorari proceedings. Earlier precedents under prior practice acts were held controlling.³⁵

Rule 22 of the Supreme Court³⁶ was amended after the decision in *Goodrich v. Sprague*³⁷ to permit the trial court to pass upon alternative motions for new trial and for judgment notwithstanding the verdict so as to facilitate the ultimate disposition of the case on appeal. When the case is considered on appeal, therefore, the appellate tribunal, if it reverses the action granting judgment notwithstanding the verdict, should also pass upon the ruling on the motion for new trial. It would be error to reverse on the first question alone, for the mandate would then operate to direct the trial court to enter judgment on the verdict without giving appellant a chance to secure review of the order refusing to grant a new trial.³⁸ For these reasons, it was held to be error in *Millikan National Bank of Decatur v. Shellabarger Grain Products Company*³⁹ for the Appellate Court to reverse the order granting judgment notwithstanding the verdict without also passing on the question of defendant's right to a new trial. The Supreme Court declared itself unable to decide the latter point for it was not in a position to weigh the evidence.⁴⁰

One other minor point of appellate procedure might be mentioned. Although the legislature, when enacting the present Justices and Constables Act,⁴¹ apparently intended a complete revision of the law, they did not expressly repeal all prior acts on the subject. One former provision declared that informalities in the appeal bond filed in an appeal from a justice of the peace should not be ground for dismissing the appeal but that the appellant might, if necessary, amend the bond within a reason-

³⁵ *People ex rel. McDonnell v. Thompson*, 316 Ill. 11, 146 N. E. 473 (1925); *People ex rel. Dibelka v. Reinberg*, 263 Ill. 536, 105 N. E. 715, L. R. A. 1915E 401 (1914).

³⁶ Ill. Rev. Stat. 1945, Ch. 110, § 259.22.

³⁷ 376 Ill. 80, 32 N. E. (2d) 897 (1941), reversing 304 Ill. App. 556, 26 N. E. (2d) 884 (1940).

³⁸ Such motion would necessarily be denied if judgment was granted notwithstanding the verdict.

³⁹ 389 Ill. 196, 58 N. E. (2d) 892 (1945), reversing 322 Ill. App. 189, 54 N. E. (2d) 392 (1944).

⁴⁰ *Gnat v. Richardson*, 378 Ill. 626, 39 N. E. (2d) 337 (1942).

⁴¹ Ill. Rev. Stat. 1945, Ch. 79, § 1 et seq.

able time to cure defects therein.⁴² It was held, in *Antrim v. Guyer & Calkins Company*,⁴³ that such statute still had operative effect and, as a consequence, it was error to dismiss an appeal from a decision of a justice of the peace because the bond was lacking a surety.⁴⁴

ENFORCEMENT OF JUDGMENTS

Efforts to defeat the enforcement of judgments usually lead to litigation, not infrequently because the fraudulent debtor has difficulty in obtaining the return of his property after danger is past. In *Staufenbiel v. Staufenbiel*,⁴⁵ the grantor sought the aid of equity to recover an interest in land conveyed to his brother in anticipation of divorce. Upon finding that the parties had dealt in real estate on a confidential basis for several years, the court granted relief on the ground that a fiduciary relationship existed. The rule of *parti delicto* was rejected because the court failed to find that the grantor's wife had, in fact, been defrauded. The creditor in *Ziegler v. Obernuefemann*,⁴⁶ however, succeeded in upsetting a conveyance by a debtor to his children made upon a stated consideration of one dollar but lacking in revenue stamps. A claim that true consideration for the conveyance existed because the grantor was indebted to his children for work done by them on the farm was rejected when the court noted that "there must be clear and satisfactory proof of a valid and subsisting debt"⁴⁷ in situations of this character.

The rights of the judgment creditor against property held in joint tenancy between the debtor and another were discussed in two cases. *Maurican v. Haugen*⁴⁸ involved a situation where title was held of record in the name of husband and wife as joint tenants, and levy and sale was attempted under an execution against the husband. The wife was permitted to enjoin the

⁴² Laws 1872, § 69; Ill. Rev. Stat. 1945, Ch. 79, § 180.

⁴³ 324 Ill. App. 641, 59 N. E. (2d) 316 (1945).

⁴⁴ Ill. Rev. Stat. 1945, Ch. 79, § 116, sets forth the form of the bond to be used which, from its language, indicates that surety is required.

⁴⁵ 338 Ill. 511, 58 N. E. (2d) 569 (1944).

⁴⁶ 323 Ill. App. 317, 55 N. E. (2d) 539 (1944).

⁴⁷ 323 Ill. App. 317 at 321, 55 N. E. (2d) 539 at 541.

⁴⁸ 387 Ill. 186, 56 N. E. (2d) 367 (1944).

sale because the property in fact belonged to her and the deed in joint tenancy had been issued in error. The court held that the judgment lien⁴⁹ extended only to the debtor's actual, rather than to his apparent, interest so long as no fraud had been perpetrated on the creditor nor any reliance placed on the apparent ownership. The effect of the severance of a joint tenancy by death of the judgment debtor after levy but prior to sale was considered in *Van Antwerp v. Horan*.⁵⁰ It was there held proper to enjoin further proceedings under the execution because the mere levy had not destroyed the joint tenancy or affected the right of survivorship so the property passed to the surviving joint tenant free of the judgment lien.

Questions concerning the right to reach the contents of a safety-deposit box by garnishment proceedings were presented in *Morris v. Beatty*.⁵¹ The Appellate Court held that the conduct of the vault proprietor in permitting the judgment debtor to have access to the box after service of demand made it liable unless it could show that there was no property contained therein subject to garnishment. Upon leave to appeal, the Supreme Court reversed upon the technical ground that there had been no traverse filed to the garnishee's answer denying control over the contents of the box.⁵² The fundamental issue as to whether such property may be reached by the creditor, and in what fashion, was left unanswered. A slight change in the Garnishment Act requires that the form of wage demand made necessary by Section 14 thereof must hereafter include a statement of the name of the court and the date of the judgment upon which the demand is based.⁵³

The operation and effect of judgments based on the Dram Shop Act⁵⁴ were also made the subject of consideration in two cases. *Skiras v. Magen*⁵⁵ decides that a judgment rendered in

⁴⁹ Ill. Rev. Stat. 1945, Ch. 77, § 1.

⁵⁰ 390 Ill. 449, 61 N. E. (2d) 358 (1945).

⁵¹ 323 Ill. App. 390, 55 N. E. (2d) 830 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 182, 43 Mich. L. Rev. 792.

⁵² *Morris v. Beatty*, 390 Ill. 568, 62 N. E. (2d) 478 (1945).

⁵³ Laws 1945, p. 936, H. B. 682; Ill. Rev. Stat. 1945, Ch. 62, § 14.

⁵⁴ Ill. Rev. Stat. 1945, Ch. 43, § 135 et seq.

⁵⁵ 324 Ill. App. 250, 58 N. E. (2d) 323 (1944).

such an action against several defendants is a unit judgment, as in other civil cases, hence if invalid as to one is invalid as to all.⁵⁶ In the other case, that of *Gibbons v. Cannaven*,⁵⁷ judgment had been obtained against the lessee, a tavern keeper, and proceedings were then instituted to foreclose the judgment lien against the demised premises.⁵⁸ The lessor sought leave to appeal from the law judgment but his application was denied on the ground that, as he had not been named defendant nor had been given leave to intervene, he possessed no right to appeal. The claim that such a result violated due process was said to be lacking in force for procedure of like character under a former statute had been upheld on the ground that the mere act of leasing premises for dram shop purposes amounted to a waiver of usual requirements.⁵⁹ The case forcefully demonstrates the proposition that a judgment lien may attach to land in Illinois without either personal service upon or notice by publication to the owner.

IV. CRIMINAL LAW AND PROCEDURE

It is fundamental law that the accused cannot be convicted of a crime unless it can be shown that he has engaged in some forbidden act or has failed to perform some duty imposed on him by law. The absence of proof of any overt act on defendant's part, therefore, required that a conviction in the case of *People v. Hensley*¹ for maintaining a public nuisance be reversed without remanding. It appeared therein that a corporately-owned pipe line carrying oil had broken and the escaping oil had tainted the local water supply. The defendant company superintendant acted promptly to repair the break and remedy the condition created, but despite this was prosecuted under a statute which declares it to be a public nuisance to corrupt any water supply.²

⁵⁶ The claim of invalidity rested in the fact that one of the defendants was a minor and a default judgment had been taken without the appointment of a guardian ad litem.

⁵⁷ 325 Ill. App. 337, 60 N. E. (2d) 254 (1945).

⁵⁸ An enforceable lien is expressly conferred by Ill. Rev. Stat. 1945, Ch. 43, § 136.

⁵⁹ See *Garrity v. Eiger*, 272 Ill. 127, 111 N. E. 735 (1916), affirmed in 246 U. S. 97, 38 S. Ct. 298, 62 L. Ed. 596 (1918).

¹ 325 Ill. App. 291, 60 N. E. (2d) 114 (1945).

² Ill. Rev. Stat. 1945, Ch. 38, § 466(3).

It did not appear that defendant had anything to do with the purchase or installation of the defective equipment nor had he any warning that the line was in defective condition, so reversal of the conviction was clearly justified.

Of interest, though scarcely any longer of practical value, is the decision in *People v. Dunsworth*³ wherein it was held that United States gasoline rationing coupons constituted property which could be the subject of larceny and might, therefore, be received as stolen property. The contention that such coupons belonged to the federal issuing agency and not to the named victim was rejected on the ground that the latter's possession at the time of the theft was enough to support the charge.⁴ Regarded as equally without foundation was the argument that as the coupons possessed no value it could not be said that the victim suffered any loss, for pecuniary loss to the victim is not regarded as essential.⁵

All other cases arising during the year involved no new points of criminal law, but statutory additions to the Criminal Code now make it criminal to handle sulfa drugs except on prescription,⁶ to bribe participants in sporting events or athletic contests,⁷ to disseminate false or misleading advertisements,⁸ to broadcast defamatory matter by radio,¹⁰ or to defraud a newsboy under eighteen.¹⁰ Penalties have also been provided for selling commercial fertilizers having less than a minimum percentage of certain ingredients,¹¹ for operating an unlicensed community currency exchange,¹² for employing minors in contravention of a new child labor law,¹³ for failing to pay women employees less than a minimum fair wage,¹⁴ or for operating

³ 323 Ill. App. 470, 56 N. E. (2d) 52 (1944).

⁴ *People v. Fitzgerald*, 297 Ill. 264, 130 N. E. 720 (1921).

⁵ *People v. Racine*, 362 Ill. 602, 1 N. E. (2d) 63 (1936).

⁶ Laws 1945, p. 693, H. B. 407; Ill. Rev. Stat. 1945, Ch. 38, § 186a-b.

⁷ Laws 1945, p. 681, H. B. 137; Ill. Rev. Stat. 1945, Ch. 38, § 83a et seq.

⁸ Laws 1945, p. 680, S. B. 91; Ill. Rev. Stat. 1945, Ch. 38, § 249a.

⁹ Laws 1945, p. 683, S. B. 235; Ill. Rev. Stat. 1945, Ch. 38, §§ 404.1-404.4.

¹⁰ Laws 1945, p. 678, H. B. 59; Ill. Rev. Stat. 1945, Ch. 38, § 301a.

¹¹ Laws 1945, p. 19, H. B. 687; Ill. Rev. Stat. 1945, Ch. 5, § 48.

¹² Laws 1945, p. 368, S. B. 107; Ill. Rev. Stat. 1945, Ch. 16½, § 32.

¹³ Laws 1945, p. 754, H. B. 508; Ill. Rev. Stat. 1945, Ch. 48, § 31.1 et seq.

¹⁴ Laws 1945, p. 814, H. B. 747; Ill. Rev. Stat. 1945, Ch. 48, § 198.15.

an unlicensed dairy plant.¹⁵ Amendment has also occurred in the Narcotic Drug Act¹⁶ by adding new compounds and increasing the penalty imposed where cannabis forms the basis of violation,¹⁷ and the proviso which heretofore limited the statute condemning crimes against children¹⁸ has now been repealed.¹⁹

In the field of criminal procedure a few cases are worthy of some notice. While the statutory authority for impanelling a special grand jury is limited to situations where the judge is of the opinion that "public justice" requires it,²⁰ it was deemed sufficient to support the validity of the special grand jury called in *People v. Jameson*²¹ that the judge ordered the calling of one because the "public interest" made such necessary. The variation in language was treated as of no consequence especially since the defendant made no challenge to the array nor moved to quash the indictment but instead pleaded thereto.²²

Habitual Criminal acts have withstood assaults on constitutional grounds ever since the United States Supreme Court endorsed the validity of the idea inherent in such laws.²³ The Illinois statute has been likewise tested,²⁴ but new attacks are made every year. Two such assaults on novel grounds were made this past year but each failed to produce results. In *People v. Hanke*²⁵ the claim was advanced that the local statute operated as an *ex post facto* law against the particular defendant since the original conviction which was made the basis of the charge that he was an habitual offender had not been included in the category of offenses calling for the more severe punishment at the time he was first sentenced although it had been

¹⁵ Laws 1945, p. 893, S. B. 184; Ill. Rev. Stat. 1945, Ch. 56½, § 221 et seq.

¹⁶ Laws 1945, p. 684, H. B. 163; Ill. Rev. Stat. 1945, Ch. 38, § 192.1 et seq.

¹⁷ Laws 1945, p. 686, S. B. 301; Ill. Rev. Stat. 1945, Ch. 38, § 192.23.

¹⁸ Ill. Rev. Stat. 1943, Ch. 38, § 109.

¹⁹ Laws 1945, p. 677, H. B. 384; Ill. Rev. Stat. 1945, Ch. 38, § 109.

²⁰ Ill. Rev. Stat. 1945, Ch. 78, § 19.

²¹ 387 Ill. 367, 56 N. E. (2d) 790 (1944).

²² That a plea to an indictment waives all antecedent irregularities, see *People v. Gray*, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215 (1913).

²³ *McDonald v. Massachusetts*, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 542 (1901).

²⁴ *Kelly v. People*, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184 (1886).

²⁵ 389 Ill. 602, 60 N. E. (2d) 395 (1945).

added before the second crime occurred.²⁶ In the other case, that of *People v. Lawrence*,²⁷ the claim of unconstitutionality rested principally on the charge that the law amounted to an attainder statute as it (1) tended to prejudice the accused when before the jury, (2) laid an unequal hand on only certain persons, and (3) condemned the accused without a judicial trial. Both attacks failed when the court reannounced the fundamental theory of the habitual criminal statutes, to-wit: the additional punishment imposed is not assessed in retrospect for the prior offense but is the just measure for the new one. When so regarded, the statute clearly does not become either an *ex post facto* law nor serve as a bill of attainder.

Although imposition of sentence in criminal cases is always the function of the judge, the amount of the punishment may sometimes be fixed by the court²⁸ and sometimes by the jury. A change in the criminal code made by the legislature in 1943, however, declared that in all cases not covered by the Sentence and Parole Act²⁹ the jury shall assess the punishment unless the accused pleads guilty.³⁰ That amendment, according to the court in *People v. Moore*,³¹ has had the effect of repealing specific provisions on the subject found in earlier acts so that, regardless of the language thereof, imposition of punishment by the court is erroneous in all cases where a jury is used.³² Unless this fact is borne in mind, confusion is likely to occur in the future for a person examining a specific provision of the criminal code covering a particular offense is not likely to have his attention drawn to the general provisions regarding punishment.

The use of habeas corpus proceedings to secure relief from

²⁶ The first sentence, pronounced in 1940, was for rape. That offense was not added to the list of habitual offenses until the following year: Laws 1941, Vol. I, p. 573; Ill. Rev. Stat. 1945, Ch. 38, § 602.

²⁷ 390 Ill. 499, 61 N. E. (2d) 361 (1945).

²⁸ Ill. Rev. Stat. 1945, Ch. 38, § 60.

²⁹ Ibid., Ch. 38, § 801 et seq.

³⁰ Laws 1943, Vol. I, p. 586; Ill. Rev. Stat. 1945, Ch. 38, § 754a.

³¹ 324 Ill. App. 109, 57 N. E. (2d) 511 (1944).

³² The court noted that while Laws 1943, Vol. I, p. 586, S. B. 318, is printed in the Ill. Rev. Stats. for 1943 and 1945 at Ch. 38, § 754a, no mention is made therein of Laws 1943, Vol. I, p. 589, H. B. 342, which passed at the same session and which, though generally similar, does not contain the specific provision involved.

a criminal sentence is a legitimate way to raise questions concerning the validity of the judgment under which a person is incarcerated. Such proceedings must be instituted in a state court, however, even though the claim is made that federal constitutional rights have been invaded. Recourse can be had to federal courts only after all state remedies have been exhausted, including all appellate review permitted by state law.³³ It is not necessary, according to *White v. Ragen*,³⁴ that certiorari be obtained from the federal Supreme Court to review the state court action before applying to the federal courts for relief, and denial of certiorari by that court is not to be regarded as precluding a lower federal court from inquiring into the matter. The fact that the state supreme court refuses to exercise its original jurisdiction over habeas corpus³⁵ is not enough to warrant a federal court taking over jurisdiction, judging from the holding in *United States v. Ragen*,³⁶ since other state tribunals have concurrent jurisdiction in such cases.³⁷ Resort to them is, therefore, necessary.

Judicial review of orders revoking probation granted to an offender is contemplated by the statute but the same provision directs that the several appellate courts are given jurisdiction "finally to hear and determine" all such appeals.³⁸ A writ of error issued by the Illinois Supreme Court in *People v. Kuduk*³⁹ to review the action of the appellate court in such a case was subsequently dismissed for the reason that jurisdiction in such cases is confined solely to the intermediate tribunal.

Legislative attention to matters of procedure in criminal cases has been confined to a change in the place of imprisonment

³³ *Ex parte Hawk*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572 (1944).

³⁴ — U. S. —, 65 S. Ct. 978, 89 L. Ed. (adv.) 932 (1945).

³⁵ Ill. Const. 1870, Art. VI, § 2. The Illinois Supreme Court has indicated it would not hear petitions which raise questions of fact only: *People ex rel. Swolley v. Ragen*, 390 Ill. 106, 61 N. E. (2d) 248 (1945). See also report of announcement made by the court in conjunction with that case noted in — U. S. — at —, 65 S. Ct. 978 at 981, 89 L. Ed. (adv.) 932 at 935.

³⁶ 143 F. (2d) 774 (1944), reversing 52 F. Supp. 265 (1943).

³⁷ Ill. Rev. Stat. 1945, Ch. 65, § 2.

³⁸ *Ibid.*, Ch. 38, § 798.

³⁹ 388 Ill. 248, 57 N. E. (2d) 755 (1944).

for persons guilty of maliciously destroying a building,⁴⁰ and to a complete revision of the law concerning the business of giving bail.⁴¹

V. FAMILY LAW.

Questions concerning the validity of marriages still come before the courts. While a marriage procured by duress may be annulled,¹ it appears from the holding in *Smith v. Saum*² that no sufficient ground for annulment will exist if the alleged duress consists of an arrest and prosecution on a bastardly charge, provided such proceedings have not been maliciously instituted without probable cause. The choice to marry in order to avoid prosecution on the quasi-criminal charge cannot later be rescinded in the absence of proof that the plaintiff was immature and inexperienced.³ Remarriage before a divorce has become final, on the other hand, does present ground for annulment since the allegedly divorced person lacks legal capacity to enter into a second union until the decree of divorce is, in fact, signed.⁴ An attempt by the second spouse of the allegedly divorced person, who had married him prior to presentation and signing of the decree but after the court had indicated that a decree should be prepared, to correct the record in the earlier divorce proceeding to which she was not a party by amending the same to show that the decree had been entered *nunc pro tunc* as of a date prior to the remarriage, was denied in *Richmond v. Richmond*.⁵ The unfortunate but innocent supposed spouse learned, as have many others, that it is wise to investigate before marrying, particularly where it is claimed that an earlier marriage has been terminated by divorce.

Matters concerning proof of divorce actions were involved in three cases. In one of them, a rule of long standing of the

⁴⁰ Laws 1945, p. 677, H. B. 385; Ill. Rev. Stat. 1945, Ch. 38, § 425.

⁴¹ Laws 1945, p. 670, S. B. 543; Ill. Rev. Stat. 1945, Ch. 38, § 627c et seq.

¹ O'Brien v. Eustice, 298 Ill. App. 510, 19 N. E. (2d) 137 (1939).

² 324 Ill. App. 299, 58 N. E. (2d) 248 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 346.

³ Thorne v. Farrar, 57 Wash. 441, 107 P. 347, 27 L. R. A. (N. S.) 385 (1910).

⁴ Moore v. Shook, 276 Ill. 47, 114 N. E. 592 (1916).

⁵ 326 Ill. App. 234, 61 N. E. (2d) 573 (1945).

Circuit and the Superior Court of Cook County which required the personal appearance in open court of the plaintiff was challenged.⁶ That rule was declared unconstitutional in *Kinsley v. Kinsley*⁷ on the ground that it imposed additional burdens upon a litigant not contemplated by the statute regulating the trial of divorce actions,⁸ hence wrought a change in the substantive law. Not determined, because not involved, was the question of the right to establish a divorce case by the use of depositions.⁹ The action taken in *Church v. Church*,¹⁰ however, would clearly seem to violate the statute¹¹ for there a witness, minor child of the parties, was privately interrogated by the judge in chambers with the consent of and in the absence of the litigants or the court reporter. Although the appellate court indicated the practice was not to be commended, it indicated that because neither special findings of fact or certificate of evidence are any longer necessary¹² the absence of the testimony of the witness from the record did not amount to error. In still another case, that of *Levy v. Levy*,¹³ the court rejected the idea that before a husband can obtain a divorce on the ground of cruelty he must prove that he could not protect himself from violence by the proper exercise of his marital powers.¹⁴ The court indicated that the divorce statute does not create a double standard, requiring one degree of cruelty to support a divorce complaint by a husband and another and different degree if the plaintiff is the wife, so that what would be "extreme and repeated cruelty" as to one could be regarded as identically actionable if offered to the other.

Maintenance of jurisdiction once acquired in divorce or sepa-

⁶ See Rule 60, § 4, Circuit Court of Cook County, effective January 1, 1934. The Superior Court rule is identical. A discussion of the problem presented by such rules may be found in 22 CHICAGO-KENT LAW REVIEW 197.

⁷ 388 Ill. 194, 57 N. E. (2d) 449 (1944).

⁸ Ill. Rev. Stat. 1945, Ch. 40, § 9.

⁹ On this point see 22 CHICAGO-KENT LAW REVIEW 197, particularly pp. 199-201.

¹⁰ 324 Ill. App. 557, 58 N. E. (2d) 739 (1945).

¹¹ Ill. Rev. Stat. 1945, Ch. 40, § 9, requires that the witness testify in "open court."

¹² Ill. Rev. Stat. 1945, Ch. 110, § 188(3).

¹³ 388 Ill. 179, 57 N. E. (2d) 366 (1944), reversing 320 Ill. App. 608, 51 N. E. (2d) 829 (1943).

¹⁴ That idea seems to have been first expressed in *DeLaHay v. DeLaHay*, 21 Ill. 252 (1859).

rate maintenance proceedings has heretofore been possible by the use of the writ *ne exeat*.¹⁵ A novel twist was presented in *Kahn v. Kahn*¹⁶ where, upon suit for separate maintenance, the court upheld an injunction restraining defendant from instituting marital proceedings in any court other than one in Illinois although defendant had done no more than threatened to take such action.¹⁷ Equitable restraint upon a person's right to sue in any court he might choose is rarely indulged in,¹⁸ but the emigration of persons to states where at least a questionable divorce can be obtained readily has forced recognition of the fact that if some method is not utilized substantial rights may be nullified. Had defendant begun proceedings elsewhere, the use of injunction to restrain the further prosecution thereof would not be unwarranted,¹⁹ so extension thereof to situations like that before the court is not unreasonable particularly since defendant can secure all the relief he might need by counterclaim.

Two changes were made in the Divorce Act by the legislature. Venue may now be laid in either the county of plaintiff's or of defendant's residence,²⁰ and the allowance of attorney's fees may now run directly to the attorney and be enforced by execution²¹ instead of being made payable to the spouse.²² Unwarranted appeals, however, cannot be made the basis of application for suit money and attorney's fees, according to *Barton v. Barton*,²³ for the court there reversed an order directing the husband to pay the expenses of the wife on a petition for leave to appeal from a determination dismissing a counterclaim for separate maintenance for want of equity.²⁴ Although the statute

¹⁵ Ill. Rev. Stat. 1945, Ch. 97, § 1 et seq.

¹⁶ 325 Ill. App. 137, 59 N. E. (2d) 874 (1945).

¹⁷ *DeRaay v. DeRaay*, 8 N. Y. S. (2d) 361, 255 App. Div. 544 (1938), holds that injunction based on mere threat is not warranted.

¹⁸ *Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178 (1908).

¹⁹ See annotation in 128 A. L. R. 1449.

²⁰ Laws 1945, p. 696, H. B. 460; Ill. Rev. Stat. 1945, Ch. 40, § 6. Prior thereto, action had to be instituted in the county of plaintiff's residence: Ill. Rev. Stat. 1943, Ch. 40, § 6.

²¹ Laws 1945, p. 694, S. B. 71; Ill. Rev. Stat. 1945, Ch. 40, § 16.

²² The former practice is illustrated by *Anderson v. Steger*, 173 Ill. 112, 50 N. E. 665 (1898).

²³ 323 Ill. App. 357, 55 N. E. (2d) 542 (1944).

²⁴ See *Barton v. Barton*, 318 Ill. App. 68, 47 N. E. (2d) 496 (1943). Leave to appeal was denied.

provides for such an allowance,²⁵ the granting thereof is discretionary and ought not to rest merely on an unverified petition²⁶ or be granted where the appeal is clearly without merit.

Issues involving the rights and obligations of infants have also been presented for decision. The liability of a minor for a tort committed by his agent was the subject of discussion recently in the case of *Palmer v. Miller*.²⁷ At that time, the question of the minor's liability on the theory that, as he was present and exercising control over the driver of the car at the time of the collision, the driver's negligence might be imputed to him was left undecided. New pleadings were presented in the case upon remandment to frame an action on such theory and, upon re-trial, a judgment was obtained by plaintiff. That judgment was affirmed when the Appellate Court concluded that it was the duty of the minor, being then present, to control the conduct of the driver whom he had placed in charge of operating the automobile.²⁸ His failure so to do was regarded as a tort on the minor's part independent of any doctrines of agency law.

Rights of inheritance belonging to adopted children were also considered. In one case, that of *In re Tilliski's Estate*,²⁹ it was held that the adopted child does not lose the right to inherit from its natural parents even though it acquires the right so to do from the parents by adoption.³⁰ Acceptance of a bequest or devise from the adopting parents prior to the death of the natural parent in no way operates to change such rule. In the other case, *Belfield v. Findlay*,³¹ it was declared that an adopted child was not entitled to claim as a remainderman under the will of the grandparent by adoption, even though the devise was to go to the "children" of the named life-tenant, the adopting parent, since the majority of the court felt that term had to be limited to the issue of the life-tenant. That result was

²⁵ Ill. Rev. Stat. 1945, Ch. 68, § 22. See also, as to divorce cases, Ch. 40, § 16.

²⁶ *Benham v. Benham*, 107 Ill. App. 424 (1903).

²⁷ 380 Ill. 256, 43 N. E. (2d) 973 (1942), reversing 310 Ill. App. 582, 35 N. E. (2d) 104 (1941), noted in 21 CHICAGO-KENT LAW REVIEW 195, 31 Ill. B. J. 355.

²⁸ *Palmer v. Miller*, 323 Ill. App. 528, 56 N. E. (2d) 447 (1944).

²⁹ Sub nom. *Tilliski v. Martin*, 390 Ill. 273, 61 N. E. (2d) 24 (1945), affirming 323 Ill. App. 490, 56 N. E. (2d) 481 (1944).

³⁰ Ill. Rev. Stat. 1945, Ch. 3, § 165.

³¹ 389 Ill. 526, 60 N. E. (2d) 403 (1945). Stone, J., wrote a dissenting opinion.

achieved, despite the doctrine that a testator is presumed to make a will with knowledge of the existing law,³² on the ground that the testatrix there concerned could not have contemplated the adopted child as a potential devisee under the will inasmuch as the will was made and the testatrix died before the adopted child was born. The majority relied upon a general statement that if the provision is for the children of some person other than the testator the presumption is that an adopted child is not to be included "unless there is language in the will, or there are circumstances surrounding the testator at the time he made the will, which make it clear that the adopted child was intended to be included."³³ A vigorous dissent written by Justice Stone criticized the holding of the majority by demonstrating that earlier Illinois cases were distinguishable from the immediate problem³⁴ and by noting that interpretation of the Massachusetts statute, from which the Illinois provision had been taken, had reached a contrary result.³⁵

Review of an adoption decree was denied to a natural parent in *Ekendahl v. Svolos*³⁶ upon the ground that adoption proceedings are purely statutory in origin and, in the absence of statutory authority for appeal, a writ of error will not lie since no question of property rights is involved. Following the decision of that case, measures were introduced in the 64th General Assembly to remedy an obvious defect in the law. Two such measures were enacted. The first, amending Section 13 of the former Adoption Act,³⁷ purported to permit any party to the adoption proceeding to appeal from any final order in the method provided by the Civil Practice Act.³⁸ Unfortunately, a complete

³² *Munie v. Gruenewald*, 289 Ill. 468, 124 N. E. 605 (1919).

³³ See annotation in 70 A. L. R. 621 to *Mooney v. Tolles*, 111 Conn. 1, 149 A. 515 (1930).

³⁴ *Moffet v. Cash*, 346 Ill. 287, 178 N. E. 658 (1931); *Smith v. Thomas*, 317 Ill. 150, 147 N. E. 788 (1925); *Wallace v. Noland*, 246 Ill. 535, 92 N. E. 956, 138 Am. St. Rep. 247 (1910), were cases in which there was evidence of intention to confine the provisions of the will to blood relatives.

³⁵ *Sewall v. Roberts*, 115 Mass. 262 (1874).

³⁶ 388 Ill. 412, 58 N. E. (2d) 585 (1945), reversing *In re Petition of Ekendahl*, 321 Ill. App. 457, 53 N. E. (2d) 302 (1944), noted in 39 Ill. L. Rev. 88. A complete discussion of the subject may be found in *Zacharias, Judicial Review of Adoption Decrees*, 23 CHICAGO-KENT LAW REVIEW 233 (1945).

³⁷ Ill. Rev. Stat. 1943, Ch. 4, § 13.

³⁸ Laws 1945, p. 16, H. B. 219.

revision of the Adoption Act was also enacted at the same time, so the old law was repealed almost as soon as it was amended.³⁹ The new Adoption Act likewise purports to grant the right of appeal to "any party to the proceeding who considers himself aggrieved" by any such final order but limits the time for such appeal to thirty days after the entry of the order appealed from.⁴⁰ On the basis that half a loaf is better than no bread at all, the present statute represents an advantage over the situation disclosed to exist by the decision in the Ekendahl case. It is far from adequate, however, since it will require judicial construction to determine if a natural parent is a person "aggrieved,"⁴¹ and the time limitation is unreasonably short as applied to a person presumably notified by publication, particularly if the notice is not, in fact, received.⁴²

VI. PROPERTY

REAL AND PERSONAL PROPERTY

Perhaps the most troublesome decision handed down during the past year is that of the Illinois Supreme Court in *Corwin v. Rheims*.¹ Should the court elect to maintain the position there taken with respect to the application of the rule against perpetuities, the entire basis of contingent future interests in Illinois would seem to be threatened, both as contained in existing instruments and those which may be created by draftsmen in the future. The case involved the conveyance *inter vivos* to a trustee of certain lots subject to a ninety-nine year lease, of which approximately eight years had already run. Practically none of the language of the trust instrument is set out in the opinion, but certain of the provisions here pertinent were stated by the

³⁹ Laws 1945, p. 16, S. B. 226; Ill. Rev. Stat. 1945, Ch. 4, § 9-1.

⁴⁰ Laws 1945, p. 16, S. B. 226; Ill. Rev. Stat. 1945, Ch. 4, § 7-2.

⁴¹ To be "aggrieved," the person must usually show that the decree or judgment operates on his property or bears directly on his interests: *In re Everly's Estate*, 322 Ill. App. 363, 54 N. E. (2d) 627 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 94. In the light of the attitude displayed by the Supreme Court in the Ekendahl case, the term used could hardly be said to extend to the natural parent.

⁴² See 23 CHICAGO-KENT LAW REVIEW 233, particularly pp. 244-5. Compare with draft of proposed statute noted there at pp. 248-9.

¹ 390 Ill. 205, 61 N. E. (2d) 40 (1945). Gunn, J., wrote a dissenting opinion.

court to be that the trustee was empowered to collect the rents and income from said property, deduct necessary expenses, and distribute the balance in equal shares to three children; provided that if any such child should die leaving lawful issue, the share of such deceased child should go to such lawful issue in equal shares and if any child should die without leaving lawful issue, then such share should go to the surviving children of the settlor; and that "in the event of the death of all three of said beneficiaries, then the income of said property is to be divided equally among the legal heirs of said beneficiaries by said trustee or his successor."²

The court held that the trust attempted no disposition of the corpus of the estate but was confined to the income, stressed particularly the fact that the gift of the income to the three children was not given to them as a class but as individuals, and pronounced the provisions as within the rule against perpetuities. This holding is apparently based upon the assumption that the trusts in favor of each child are to be treated as so utterly independent that only the life of that one child can be used for the purpose of applying the rule. It is true, of course, as the court points out, that more than twenty-one years might intervene between the death of either of the children dying first and the ultimate vesting in the "legal heirs" of the children upon the death of the survivor of the children.

However independently the court might treat the interests of the three children, it is difficult to understand how it could refuse to use the "lives" of three named persons in being for the purpose of determining whether or not the rule against perpetuities was violated.³ The court apparently conceded that the "legal heirs" would be determined by the death of the survivor

² 390 Ill. 205 at 209, 61 N. E. (2d) 40 at 43.

³ *Madison v. Larmon*, 170 Ill. 65, 48 N. E. 556 (1897); *Thellusson v. Woodford*, 11 Ves. jr. 112, 32 Eng. Rep. 1030 (1805); *Re Villar*, 1 Ch. (1929) 243; *Fitchie v. Brown*, 211 U. S. 321, 29 S. Ct. 106, 53 L. Ed. 202 (1908). In the first case cited, the Illinois Supreme Court quoted with approval the general rule laid down in *Gray, Rule Against Perpetuities*, § 216, to the effect that "The contingency may be postponed for any number of lives, provided they are all in being when the contingent interest is created; and the persons whose lives are taken need have no interest in the estate."

and the gift over then vested. Adequate analysis and discussion of the opinion is beyond the scope of this survey, but it is rendered unnecessary by the existence of a very able comment by Professor Schnebly of the University of Illinois Law School.⁴

How the draftsman of trust instruments is to meet this situation does not appear. Some of the language of the majority opinion would seem to suggest that the court might have held otherwise had the gift to the three children been made to them as a class. That would seem about the only precaution which a draftsman could take without materially altering the actual substance of the structure of the trust. The device employed in the instant case, *i. e.*, delaying vesting until the expiration of several named lives in being is, of course, common practice and one for which no adequate substitute is immediately apparent. No substitute now devised can, of course, aid gifts contained in trust instruments already in effect. It may well be that the Supreme Court will have before it shortly, as a result of this opinion, several bills for instructions by trustees and an opportunity to explain, limit, or repudiate the erroneous doctrine seemingly laid down.

Other questions of property law have also been considered. Ownership of land by an alien is subject to regulation by statute in this state,⁵ one provision of which permits forfeiture of the property unless the alien makes a bona fide transfer thereof within six years of acquisition.⁶ A proceeding in the nature of office found was begun by a private citizen, in the case of *People ex rel. Kunstman v. Shinsaku Nagano*,⁷ on the ground that the alien there concerned had held land for more than six years after acquisition and had then parted with the same merely by conveying the land to a trustee for the benefit of the alien. The court, in an extensive and interesting opinion, discussed the nature of the proceeding and concluded that the same could not

⁴ See 34 Ill. B. J. 21 (1945).

⁵ Ill. Rev. Stat. 1945, Ch. 6, §§ 1-7.

⁶ *Ibid.*, § 2.

⁷ 389 Ill. 231, 59 N. E. (2d) 96 (1945), noted in 23 CHICAGO-KENT LAW REVIEW 330.

be maintained by a private citizen,⁸ hence found it unnecessary to decide whether the transfer in question was a bona fide transfer within the contemplation of the statute. There is cause to doubt, however, whether a transfer in trust for an alien would be permitted to defeat the purpose of the statute and, in a proper proceeding, the beneficial interest, if not the fee title, to real property so transferred would very likely be forfeited.⁹

Maintenance of the essential four unities necessary to every joint tenancy is just as requisite for the preservation of that type of estate as is their presence at the time of its creation. If any one or more of such unities be subsequently destroyed, the title becomes translated into a tenancy in common. For these reasons, it was claimed in *Van Antwerp v. Horan*¹⁰ that levy under an execution based upon a judgment against one joint tenant operated to destroy the joint tenancy. Injunction restraining a sale upon such levy was affirmed therein when the court concluded that (1) a mere levy does not destroy the unity of title since the debtor's title is not taken away prior to sale, and (2) that the unity of possession is not affected by the levy as the public official gains no right of possession to land merely by levying thereon although a contrary result might follow had the jointly-held property consisted of personalty. Death of the judgment debtor after the levy and before further proceedings were possible consequently resulted in the surviving joint tenant being entitled to hold the entire property against the judgment creditor as the right of survivorship had not been destroyed. Left undetermined, because not involved, is the question whether the sale on execution would destroy the unities or whether that event would not occur until the redemption period had expired and deed of the debtor's interest had in fact been issued.¹¹

⁸ Ill. Rev. Stat. 1945, Ch. 6, § 2, was declared unconstitutional to the extent that it permitted a private citizen to sue after demand on the proper public official because it undertook to deprive the Attorney General of powers vested in him by Ill. Const. 1870, Art. V, § 1.

⁹ See discussion of this point in 23 CHICAGO-KENT LAW REVIEW 330, particularly pp. 333-4.

¹⁰ 390 Ill. 449, 61 N. E. (2d) 358 (1945).

¹¹ By analogy to sales on foreclosure, it would seem that the debtor's title would not cease until deed issued, *Bradley v. Lightcap*, 202 Ill. 154, 67 N. E. 45 (1903), especially since a failure to apply for a deed in apt time, Ill. Rev. Stat. 1945, Ch. 77, § 31, nullifies the sale.

The interest in homestead conferred by statute¹² customarily belongs to the head of the household and cannot be taken or sold except on payment to him or her of the statutory allowance.¹³ It has been said that, where title is held in joint tenancy between a husband and wife, the homestead estate is vested in the spouses jointly,¹⁴ although no creditor may seize the homestead estate if the spouses are living together unless the full statutory allowance is given to the husband.¹⁵ As between the spouses, however, the case of *Brod v. Brod*¹⁶ indicates that upon partition the husband cannot compel the sale of the premises jointly held unless the full homestead allowance is granted to the wife for the net result of dividing the homestead between them would be the same as selling the property without reference to the homestead. Since the husband cannot compel the wife to relinquish her homestead except by providing another suitable homestead for her, he must set off to her the full value of the interest if he is unwilling to provide a substitute.

Unusual indeed is the holding in *Classen v. Heath*¹⁷ wherein the Supreme Court indicated that a divorced spouse entitled to claim dower¹⁸ must assert the right to the same within the same period and in the same fashion as is required of a surviving spouse who prefers to reject the provisions of a will, or decline a statutory share awarded to him or her as heir, and take the common-law dower right instead.¹⁹ Although the statute expressly refers to the "surviving spouse," the language thereof was interpreted to be applicable to the ex-spouse also.²⁰

Cases involving burial rights or interests in cemetery lots seldom arise in this state, but occasionally some problem involv-

¹² Ill. Rev. Stat. 1945, Ch. 52, § 1.

¹³ *Diets v. Hagler*, 309 Ill. 381, 141 N. E. 194 (1923).

¹⁴ *Voss v. Rezgis*, 343 Ill. 451, 175 N. E. 799 (1931).

¹⁵ *Johnson v. Muntz*, 364 Ill. 482, 4 N. E. (2d) 826 (1936).

¹⁶ 390 Ill. 312, 61 N. E. (2d) 675 (1945).

¹⁷ 389 Ill. 183, 58 N. E. (2d) 889 (1945), noted in 23 CHICAGO-KENT LAW REVIEW 313.

¹⁸ Ill. Rev. Stat. 1945, Ch. 3, § 173, bars dower in case of divorce only to the guilty spouse.

¹⁹ *Ibid.*, § 171.

²⁰ The phrase "husband or wife surviving," as used in Ill. Rev. Stat. 1945, Ch. 52, § 2, dealing with homestead, has been held not to apply to divorced persons: *Krusemark v. Stroh*, 385 Ill. 64, 52 N. E. (2d) 156 (1944).

ing this specialized branch of law of property does get before the courts.²¹ In *Goodman v. Independent Order Bickur Cholem Ukadishu*,²² a widow sued to obtain an injunction against a sectarian cemetery to restrain it from interfering with her right to remove her deceased husband's body from a cemetery lot and also from interfering with her right to sell such lot to a third person. Injunction on the first point was upheld despite the claim that, upon removal of the body, plaintiff would permit the lot to deteriorate and would thereby cause the cemetery generally to depreciate, on the ground that there was no provision in the deed or the cemetery by-laws requiring the owner to keep up the property. It also appeared that all persons who would have a right to protest against disinterment had consented to the removal of the body.²³ The injunction was, however, vacated on the second issue since plaintiff's right to sell the lot was subject to a cemetery regulation that no owner could sell without the specific consent of the cemetery authorities and such consent had not been obtained. The claim that such a regulation was unreasonable and void because violating the right of free alienation was rejected on the score that regulations of this character rest upon another and different ground from that which applies to ordinary land.²⁴

Problems of conveyancing are generated when persons unskilled in the law attempt to draft deeds for they may be unfamiliar with such fundamental requirements as that, for example, a conveyance to a person not *in esse* is necessarily void.²⁵ Such an inartificial deed was responsible for the litigation in *Pure Oil Company v. Bayler*²⁶ where the grantor and his wife, in consideration of "making support and maintenance provisions for each," conveyed the premises to "the survivor in fee simple forever survivor to dispose of they (sic) shall see fit to do."

²¹ Treatment of the entire subject may be found in Jackson, *The Law of Cadavers* (Prentice-Hall, Inc., New York, 1936).

²² 326 Ill. App. 25, 60 N. E. (2d) 892 (1945).

²³ On this point, see Jackson, *op. cit.*, p. 104.

²⁴ *Rosehill Cemetery v. Hopkinson*, 114 Ill. 209, 29 N. E. 685 (1885).

²⁵ *Herrick v. Lain*, 375 Ill. 569, 32 N. E. (2d) 154 (1941).

²⁶ 388 Ill. 331, 58 N. E. (2d) 26 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 335, 40 Ill. L. Rev. 154. Smith, J., took no part in the decision.

Against the claim that such deed was void for want of a grantee, it was urged that the intention of the owner-grantor must have been to create a defeasible fee simple in the persons concerned by the description of "the survivor." The latter contention prevailed on the theory that the grantee need not be named if he or she is described with sufficient certainty to distinguish him or her from all other persons.

A deed is, of course, ineffective to convey the interest of a grantor if not delivered during his lifetime,²⁷ but a question would be apt to arise as to whether such deed would be effective as to the other grantor when delivered. Such in fact was the dispute involved in *Creighton v. Elgin*²⁸ together with the additional question as to whether the deed was sufficient to convey only the interest held by the surviving grantor at the time of its execution or carried the larger estate obtained by such grantor in the interim between execution and delivery. The court held that such deed was not rendered void by the death of one grantor prior to delivery and also that it would serve to pass the interest later acquired on the ground that a deed speaks only as of the time of its delivery, regardless of its date.²⁹ Reported cases on these issues are extremely rare, hence the case would be noteworthy from that fact alone,³⁰ but it is also one of first impression in this state.

Rights which may arise under an option to purchase real estate were considered in *Morris v. Goldthorp*³¹ where specific performance was sought by an alleged vendee of land. It was first contended that the supposed purchaser had translated an ordinary option into a bilateral agreement by writing the word "accepted" at the foot thereof. That contention was rejected when the court indicated that it was as novel as it was unsound

²⁷ *Johnson v. Fulk*, 282 Ill. 328, 118 N. E. 706 (1918).

²⁸ 387 Ill. 592, 56 N. E. (2d) 825 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 263, 93 U. of Pa. L. Rev. 328.

²⁹ *Totten v. Totten*, 294 Ill. 70, 128 N. E. 295 (1920); *Bearss v. Ford*, 108 Ill. 16 (1883).

³⁰ The only known case identical on the facts is *Schoenberger's Executors v. Zook*, 34 Pa. St. 24 (1859).

³¹ 390 Ill. 186, 60 N. E. (2d) 857 (1945). Thompson, J., wrote a dissenting opinion.

for the act of writing such word was no more than an acceptance of the option for what it was, to-wit: a unilateral offer.³² It was then urged that the vendee had subsequently accepted such offer by a separate writing indicating a present intention to turn the unilateral offer into a bilateral contract. Enclosed with such writing was a warranty deed which vendee requested should be signed by vendor. As the option was silent as to the type of conveyance to be given and as a quit-claim deed is sufficient to pass title,³³ the court ruled that the tender of a warranty deed did not constitute an acceptance of the offer contained in the option.³⁴ Specific performance was, as a consequence, held properly denied.

But one case dealing with personal property doctrines is of any importance. Minerals *in situ* are unquestionably real property but when severed from the land, even though left thereon, they definitely become a form of personalty. The same rule applies to top soil so that the same may become the subject of a conversion.³⁵ It was argued in *Palumbo v. Harry M. Quinn, Inc.*,³⁶ however, that if the top soil were permitted to remain on the land from which it had been severed, even though piled up thereon, until it became weed-grown it would then revert to its original status, hence pass to a purchaser of the land. That argument was deemed to be without merit on the facts of the case since the purchaser of the land had notice at the time that the top soil had been severed and piled by one who had purchased the same for purpose of removal. In the absence of any showing of intention to abandon the personal property thus acquired,³⁷ the top soil was held to retain its character of personalty and thus support an action for its conversion.

³² *Keogh v. Peck*, 316 Ill. 318, 147 N. E. 266, 38 A. L. R. 1151 (1925).

³³ *Butterfield v. Smith*, 11 Ill. 485 (1850).

³⁴ Thompson, J., wrote a dissenting opinion in which he relied on *Rohling v. Thole*, 256 Ill. 425, 100 N. E. 138 (1912), to show that the acceptance of the option was unequivocal and the accompanying request for a warranty deed was surplusage which could be disregarded.

³⁵ *Citizens Nat. Bank v. Joseph Kesi & Sons Co.*, 378 Ill. 428, 38 N. E. (2d) 734 (1942), affirming 309 Ill. App. 273, 33 N. E. (2d) 133 (1941), noted in 20 CHICAGO-KENT LAW REVIEW 177.

³⁶ 323 Ill. App. 404, 55 N. E. (2d) 825 (1944).

³⁷ *McGoon v. Ankeny*, 11 Ill. 558 (1850).

LANDLORD AND TENANT

Some cases dealing with the relationship of landlord and tenant are also worthy of comment. In *Metropolitan Trust Company v. Fishman*,³⁸ for example, a tenant under a lease granted by a receiver claimed that his obligation to pay past due rent was destroyed when, upon order of court, the lease was "cancelled" and his possession terminated, so that any suit for the back rent had to be based on use and occupation, a claim which would have been barred by the shorter statute of limitations.³⁹ While such contention might have been sound had the lease been rescinded,⁴⁰ the court held that the cancellation merely ended the right of possession but left the obligation to pay the past due rent in full force and effect. The principle of *Beach v. Boettcher*,⁴¹ to the effect that a lessee may defeat the lessor's action for possession where it appears that the demised premises have been sold for non-payment of taxes, was given a logical extension in *Wooster v. Scott*⁴² where the person in possession was the lessee of the holder of the tax deed.

The operation and effect of wartime regulations on the rights of landlord and tenant were before the court in *Crosby v. Baron-Hout Oil Company*⁴³ in which case the tenant sought relief because a provision in the lease permitted termination whenever "the use of said premises . . . be prevented, suspended or limited by any . . . Governmental action or law, or regulation." It was decided that such clause was sufficient to permit cancellation because governmental regulation restricting the sale of tires, tubes, gasoline and similar products had interfered with the tenant's use of the demised premises. Not so successful, however, was the tenant in *Moore v. Southern Independent Oil &*

³⁸ 323 Ill. App. 413, 55 N. E. (2d) 837 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 191. Leave to appeal has been denied.

³⁹ Compare Ill. Rev. Stat. 1945, Ch. 83, § 16, with § 17.

⁴⁰ United Wool Dyeing & Finishing Co. v. Werner & Co., 102 N. J. Eq. 322, 140 A. 465 (1928).

⁴¹ 323 Ill. App. 79, 55 N. E. (2d) 104 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 96. Leave to appeal denied.

⁴² 326 Ill. App. 442, 62 N. E. (2d) 36 (1945).

⁴³ 324 Ill. App. 651, 59 N. E. (2d) 520 (1945), noted in 23 CHICAGO-KENT LAW REVIEW 337.

Refining Company,⁴⁴ where the lease contained a substantially similar provision, because he had not taken advantage thereof nor had he fully surrendered possession of the premises. Condemnation of the temporary use of demised premises, on the other hand, will not excuse the tenant from his obligation to pay rent, according to *Leonard v. Autocar Sales & Service Company*,⁴⁵ even though the condemning authority obtains possession of the entire premises with the right to extend that occupation for additional yearly periods which might outlast the term.⁴⁶

Eviction of tenants, other than for non-payment of rent, has been drastically limited by rules promulgated by the Office of Price Administration but subtenants are not entitled to the benefit of such rules under the decision in *Benson v. Williams*.⁴⁷ Refusal by the original tenant to execute a new lease, a ground for eviction under such regulations, was considered in *222 East Chestnut Street Corporation v. Murphy*⁴⁸ as being justified because the lease tendered contained a standard clause for double rent in case of delay in surrendering possession⁴⁹ even though the actual refusal was predicated on a dispute as to the amount of decorating to be done. As the local statute for double rent is not abrogated but merely held in abeyance during the period of federal regulation, the holding seems gratuitously to invalidate almost every existing apartment lease. Once a certificate of eviction has been issued, it is not nullified by the fact that the lessor has accepted rent after the expiration of the term so as to create a renewal tenancy, although enforcement of rights thereunder must await the expiration of the new tenancy. It is no defense, under the ruling in *Bochner v. Rosen*,⁵⁰ that the landlord has failed to obtain a second certificate for it was there held

⁴⁴ 326 Ill. App. 112, 61 N. E. (2d) 684 (1945).

⁴⁵ 325 Ill. App. 375, 60 N. E. (2d) 457 (1945). It is understood that the decision has been affirmed on certificate of importance.

⁴⁶ An additional problem concerning the measure of damages to be awarded to the tenant whose leasehold interest is only partly condemned, so as to leave him still liable to pay rent, was presented in *United States v. General Motors Corp.*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. (adv.) 379 (1945), modifying 104 F. (2d) 873 (1944), discussed ante, p. 29.

⁴⁷ 324 Ill. App. 580, 59 N. E. (2d) 29 (1945), abst. opin.

⁴⁸ 325 Ill. App. 392, 60 N. E. (2d) 450 (1945). Leave to appeal has been denied.

⁴⁹ That clause is based on Ill. Rev. Stat. 1945, Ch. 80, § 2.

⁵⁰ 326 Ill. App. 382, 62 N. E. (2d) 24 (1945).

that the original certificate continued in effect unless or until revoked by the renting authority.

SECURITY TRANSACTIONS

It is customary, in bond-issue mortgages, to limit the right to maintain foreclosure proceedings to the indenture trustee for the benefit of the scattered bondholders. Such a provision, however, would ordinarily not prevent suit at law by an individual bondholder upon his bond as he possesses two separate and distinct rights.⁵¹ The latter right may be likewise restricted, according to *Gordon v. Conlon Corporation*,⁵² so long as suitable limitation appears in the bond itself. A restrictive provision denying the right to sue at law, even after maturity of the principal, unless a specified percentage of holders made demand for such action, was there held valid. The inability of the bondholder to obtain the consent of the required percentage because most other holders had joined in an extension agreement was not regarded as sufficient to warrant a disregard of the plain language of the instrument.

While comment appears elsewhere on the decision in *Naas v. Peters*,⁵³ persons interested in mortgage law will readily recognize the distinction between the holding therein and that laid down in the earlier case of *Bride v. Stormer*.⁵⁴ An undisclosed principal whose agent executes a mortgage can be held for a deficiency arising thereunder only if it can be shown that the principal received the proceeds of the loan so as to support an action in quasi-contract. No liability for the deficiency can be enforced in the foreclosure proceeding since the statute applies only to persons "liable for the mortgage debt."⁵⁵ On much the same theory, corporate promoters were absolved from personal liability upon a mortgage executed by the corporation in *New*

⁵¹ *Rohrer v. Deatherage*, 336 Ill. 450, 168 N. E. 266 (1929).

⁵² 323 Ill. App. 380, 55 N. E. (2d) 821 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 185.

⁵³ 388 Ill. 505, 58 N. E. (2d) 530 (1945), reversing 321 Ill. App. 212, 52 N. E. (2d) 817 (1944), noted in 40 Ill. L. Rev. 133, and also noted ante, p. 10.

⁵⁴ 368 Ill. 524, 15 N. E. (2d) 282 (1938).

⁵⁵ Ill. Rev. Stat. 1945, Ch. 95, § 17.

*York Life Insurance Company v. 1325 Astor Street Building Corporation.*⁵⁶

Mention was made last year of the decision of the Appellate Court in *Stevens v. Blue*⁵⁷ which held that a senior mortgagee could not have the benefit of a receivership obtained by a junior encumberancer unless he secured an order extending such receivership. An order so extending the receivership to cover the corpus of the mortgaged premises was there held inadequate to preserve the rents arising therefrom even though such rents had been pledged as additional security for the prior lien. Upon leave to appeal, the Illinois Supreme Court reversed on the ground that the order extending the receivership should have been given a more liberal construction so as not to deny to the prior lienholder the rights accruing from his superior position.⁵⁸

While earlier efforts to revise the mortgage law of this state failed to receive approval,⁵⁹ there is some indication that legislative interest in that direction has not become entirely extinct for a committee has now been created to make a thorough study of the entire subject and to report, with recommendations, to the 65th General Assembly.⁶⁰ Other principles of law relating to security have gone unchanged.⁶¹

WILLS AND ADMINISTRATION

The fact that the Illinois Probate Act, effective January 1, 1940, recodified the law relating to wills and administration serves to accelerate the flow of decisions in this field. Some of the more significant are here mentioned.

⁵⁶ 325 Ill. App. 536, 60 N. E. (2d) 257 (1945). Leave to appeal has been denied.

⁵⁷ 320 Ill. App. 375, 51 N. E. (2d) 603 (1943), noted in 23 CHICAGO-KENT LAW REVIEW 57.

⁵⁸ 388 Ill. 92, 57 N. E. (2d) 451 (1944), reversing 320 Ill. App. 375, 51 N. E. (2d) 603 (1943).

⁵⁹ See Crawford, Proposed Illinois Real Estate Mortgage Act, 19 CHICAGO-KENT LAW REVIEW 141 (1941).

⁶⁰ Laws 1945, p. 101, S. B. 664.

⁶¹ Attention is invited, however, to *Commercial Credit Corporation v. Horan*, 325 Ill. App. 625, 60 N. E. (2d) 763 (1945), discussed elsewhere, ante p. 14, dealing with rights under a trust receipt transaction, and to *Raymond v. Horan*, 323 Ill. App. 120, 55 N. E. (2d) 99 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 194, dealing with the use of a conditional sales contract as a substitute for a chattel mortgage. The latter case, although technically within the period of this survey, was discussed in the one for last year: 23 CHICAGO-KENT LAW REVIEW 58-9.

The problem word “or,” for example, again received consideration in *Hunsley v. Aull*.⁶² The testator there gave a life estate in certain lands to his widow and directed that “at the death of my said wife . . . I give, devise and bequeath the remainder of my said described real estate to my daughter . . . or her heirs, if she is not then surviving, to be her or their absolute property forever.” The court held the word “or” was used in its ordinary disjunctive sense, and that the clause in question devised the fee to the daughter only if she survived the life tenant.⁶³

In *Winterland v. Winterland*,⁶⁴ the will directed that the share given the son was to be held in trust and only the income paid to him so long as he might live or until his present wife should have died or became divorced, whereupon the principal of the estate was to be paid to him as his absolute property. The condition concerning divorce was held invalid as being against public policy even though the son and his wife continued married and living together until his death. The court, however, decided the gift depended on two separate and independent conditions, one of which was valid, so that the gift did not fail but passed over upon the valid limitation, to-wit: that the son survived his wife, which he did not do.

Another interesting case involving a latent ambiguity in the language of a will may be found in *Appleton v. Rea*⁶⁵ wherein the testator devised “my brick building and ground upon which it is situated in Lot 1” to a named devisee under one clause, and by another clause gave “the two buildings which I own, and the real estate upon which the same are situated on Lot 2” to another person. In fact, Lot 1 was improved with a concrete structure although two buildings, one frame and one brick, stood upon Lot 2. It was held to be error to receive oral testimony as to the

⁶² 387 Ill. 520, 56 N. E. (2d) 773 (1944).

⁶³ The court distinguished the case from the holding in *Boys v. Boys*, 328 Ill. 47, 159 N. E. 217 (1927), one of the leading cases in this state, wherein the word “or” was construed to mean “and.”

⁶⁴ 389 Ill. 384, 59 N. E. (2d) 661 (1945), noted in 40 Ill. L. Rev. 127, 33 Ill. B. J. 311.

⁶⁵ 389 Ill. 222, 58 N. E. (2d) 854 (1945), noted in 33 Ill. B. J. 312. Thompson, J., dissented.

testator's intention that it was the brick structure which he had sought to devise by the first clause, and ambiguity therein was eliminated by the simple act of deleting the word "brick" from the language thereof.⁶⁶

In another will case, that of *McNeilly v. Wylie*,⁶⁷ the will devised one-half of the residue of the testatrix's estate to her brother, who was living at the time the will was made but who predeceased her leaving children. The other one-half was devised to named devisees, the heirs of another brother previously deceased. It was held that as a will speaks from the date of the death of the testatrix and the devise to the living brother had lapsed upon his death, the interest passed under the statute of descent to the heirs of the testatrix as intestate property. The heirs of both brothers were held entitled to share and the rule of worthier title was not applied to defeat the entire residuary clause on the ground that it made the same disposition as the statute.

A question of lapsed legacies was before the court in *Greene v. Frank*⁶⁸ where the testator bequeathed \$1500 to each of his two sisters, residents of Europe, but provided that if the executor should be unable to pay the legacies on account of prevailing war conditions or for any other cause, then the legacies should lapse and become part of the residuary estate. The court, upon finding that the executor was unable to make payment to the sisters because of the war, ordered the executor to pay the sums to the residuary legatee rather than to hold the funds until normal conditions returned.

One other point as to the law of wills was settled in *Spangler v. Bell*⁶⁹ where it was declared that the requisite formalities for the execution of a will since the enactment of the Probate Act⁷⁰ are no different than those heretofore required by Section 2 of the old Wills Act.⁷¹

⁶⁶ See *Graves v. Rose*, 246 Ill. 76, 92 N. E. 601, 30 L. R. A. (N. S.) 303 (1910).

⁶⁷ 389 Ill. 391, 59 N. E. (2d) 811 (1945).

⁶⁸ 324 Ill. App. 444, 58 N. E. (2d) 465 (1944).

⁶⁹ 390 Ill. 152, 60 N. E. (2d) 864 (1945).

⁷⁰ Ill. Rev. Stat. 1945, Ch. 3, §§ 193-4.

⁷¹ Ill. Rev. Stat. 1939, Ch. 142, § 2.

Several questions were presented involving problems of administration. The right to nominate or appoint an administrator was discussed in three cases. In *Dennis v. Dennis*,⁷² a disinherited son who, in a spirit of reparation, had been willed the entire estate of the mother but who was an inmate of the penitentiary was held entitled to nominate an administrator with the will annexed for the mother's estate instead of a second son who was the ultimate beneficiary under the father's will. The decision was predicated largely upon the hostility and conflict of interest between the brothers. It is surprising to notice that nowhere in the opinion does the court refer to the last paragraph of Section 96 of the Probate Act⁷³ which expressly declares that only qualified persons shall have the right to nominate. As the named executor was disqualified from acting by reason of the penitentiary sentence,⁷⁴ he was likewise disqualified from nominating an administrator with the will annexed.

Clear language in Section 271 and 274 of the Probate Act⁷⁵ was held sufficient, in *In re Zverina's Estate*,⁷⁶ to support the appointment of the Public Administrator to take charge of real estate belonging to non-resident decedent, as against administrators appointed at the place of decedent's residence, particularly where claims against the estate have been filed by local creditors. An order vacating such appointment was there reversed. The operation of Section 166 of the act⁷⁷ was properly declared to be confined to cases where the non-resident left personalty within the jurisdiction. Only an "interested" person, such as an heir or creditor, can object to the appointment of an administrator, so it was held in *Lemmons v. Sims*⁷⁸ that a debtor of the estate had no such interest as would entitle him to raise any objection. Moreover, an appointment once made is not subject to collateral attack in a subsequent action for wrongful death under the holding of that case.

⁷² 323 Ill. App. 328, 55 N. E. (2d) 527 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 266.

⁷³ Ill. Rev. Stat. 1945, Ch. 3, § 248.

⁷⁴ *Ibid.*, § 246.

⁷⁵ *Ibid.*, §§ 425 and 428.

⁷⁶ 323 Ill. App. 585, 56 N. E. (2d) 471 (1944).

⁷⁷ Ill. Rev. Stat. 1945, Ch. 3, § 318.

⁷⁸ 326 Ill. App. 97, 61 N. E. (2d) 764 (1945).

Arguments concerning the payment of legacies were involved in *Rauschkolb v. Ruediger*⁷⁹ where the court reiterated the rule that general assets of an estate are not subject to be taken for the payment of specific legacies. It was also held that rents go to the heirs who could not be compelled to return the same even though it became necessary to sell the decedent's real estate. For these reasons, it was determined that a direction in a will to sell the testator's interest in certain realty and to pay, out of the proceeds, specified amounts to designated persons created legacies specific in character which abated ratably, did not draw interest, and were chargeable with the expenses of sale.

Other minor issues of procedure were also decided. Although Section 196 of the Probate Act⁸⁰ provides for the use of a counterclaim by the estate against any claimant who presents a claim, that provision was held to be permissive only and not mandatory in *First Trust & Savings Bank of Kankakee v. Powers*.⁸¹ The administrator may, therefore, bring an original suit on the estate's demand against the creditor if he chooses so to do. The rule has long existed that a probate court is without jurisdiction in a citation proceeding to adjudge title to realty.⁸² That doctrine has not been changed under the present Probate Act⁸³ so it was decided, in *Moser v. Feciura*,⁸⁴ that a determination in such a proceeding that the estate had no interest in certain real estate was open to collateral attack. Also worthy of note is the holding in *Christensen v. Frankland*⁸⁵ to the effect that a tort committed by the representative of an estate is perpetrated by him as an individual and may not be sued therefor in his representative capacity.

One case affecting dower has been noted elsewhere.⁸⁶ Another

⁷⁹ 325 Ill. App. 342, 60 N. E. (2d) 250 (1945).

⁸⁰ Ill. Rev. Stat. 1945, Ch. 3, § 348.

⁸¹ 325 Ill. App. 600, 60 N. E. (2d) 582 (1945). Leave to appeal has been allowed.

⁸² *Johnson v. Nelson*, 341 Ill. 119, 173 N. E. 77, 88 A. L. R. 849 (1930).

⁸³ Ill. Rev. Stat. 1945, Ch. 3, § 335-6, are confined in operation to the discovery or personal property or the "evidences . . . of title to lands."

⁸⁴ 324 Ill. App. 552, 58 N. E. (2d) 920 (1945).

⁸⁵ 324 Ill. App. 391, 58 N. E. (2d) 289 (1944).

⁸⁶ See discussion of *Classen v. Heath*, 389 Ill. 183, 58 N. E. (2d) 889 (1945), in 23 CHICAGO-KENT LAW REVIEW 313, on the duty of an ex-spouse to assert claim thereto within the time fixed by Ill. Rev. Stat. 1945, Ch. § 171.

case of significance on the same subject is *Ruwaldt v. W. C. McBride, Inc.*⁸⁷ The court there held that a widow was not required to take out letters of administration and was not deprived of her right of election because of delay in seeking administration, provided she made her election within the time fixed by law.⁸⁸ Section 1 of the former Descent Act⁸⁹ failed to specify when dower had to be asserted where no letters of administration had been issued. The present law directs that the instrument electing dower must be filed within ten months after death if no administration has occurred,⁹⁰ and the fact that the widow has a right to apply for letters⁹¹ does not in any way affect her right to utilize the full ten-month period.

The Illinois Supreme Court, by its decision in *Lewis v. Hill*,⁹² has settled the principle that the conversion by conservator of an insane person's realty into cash in order to provide support does not work an ademption beyond the point necessary to meet the needs of the ward. It has likewise been settled, in *Ortman v. Kane*,⁹³ that the conservator may do nothing which will operate as a waiver or estoppel against the ward.

Statutory changes, all effective July 1, 1945, are not as numerous nor as important as in prior years.⁹⁴ Section 205 of the act⁹⁵ has been amended by the addition of a new section which authorizes the legal representative, unless otherwise directed by the will or denied by law, to continue to operate the decedent's

⁸⁷ 388 Ill. 285, 57 N. E. (2d) 863, 155 A. L. R. 1209 (1944).

⁸⁸ The court, in its opinion, referred to Ill. Rev. Stat. 1935, Ch. 45, § 1. This was probably an error for Ch. 39, § 1, is the provision obviously intended.

⁸⁹ Ill. Rev. Stat. 1939, Ch. 39, § 1.

⁹⁰ Ill. Rev. Stat. 1945, Ch. 3, § 171.

⁹¹ *Ibid.*, § 248.

⁹² 387 Ill. 542, 56 N. E. (2d) 619 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 278, affirming 322 Ill. App. 68, 53 N. E. (2d) 736 (1944).

⁹³ 389 Ill. 613, 60 N. E. (2d) 93 (1945).

⁹⁴ Miscellaneous changes have occurred in Ill. Rev. Stat. 1945, Ch. 3, § 224, dealing with depositions (Laws 1945, p. 1, H. B. 632); § 226, concerning proof of handwriting (Laws 1945, p. 2, H. B. 3, and Laws 1945, p. 1, H. B. 632); § 241a, validating prior recorded wills (Laws 1945, p. 9, S. B. 233); §§ 265, 279, and 280, affecting appointment of conservators (Laws 1945, p. 4, H. B. 512); § 298a, concerning costs in certain guardianships (Laws 1945, p. 8, H. B. 317); and in § 357, regarding payment of claims (Laws 1945, p. 3, H. B. 476). An entirely new act, designed to protect the estates of persons declared missing in military service, has been enacted: Laws 1945, p. 7, S. B. 393; Ill. Rev. Stat. 1945, Ch. 3, § 521 et seq.

⁹⁵ Ill. Rev. Stat. 1945, Ch. 3, § 357.

business for one month following the date of appointment, unless otherwise directed by the court, without personal liability for losses incurred except for those arising from malfeasance or misfeasance. Such operation may be continued for such further time as the court might direct on proper petition. The provision has no application, however, to corporations and partnerships for it is limited to unincorporated businesses operated by the decedent as a sole proprietor.⁹⁶

Provisions for dispensing with administration of small estates left by decedents have been amended so as to make it possible to avoid expense in estates up to one thousand dollars⁹⁷ instead of the maximum figure of five hundred dollars which was heretofore applicable.⁹⁸

Titles to real property may be settled more readily by reason of the amendment to Section 225 which now forbids the sale or mortgage of a decedent's real estate more than seven years after his death for the purpose of paying claims or administration expenses.⁹⁹ Enlargement of that time is permitted only if the petition is filed within the seven-year period. The statute is made applicable to estates already probated, although the seven-year period as to them is to be measured from the effective date of the act. Claims already barred, however, are not revived. The effect of the statute is to overcome certain judicial decisions which have permitted sales many years after death, in one instance as long as twenty years after.¹⁰⁰ Hereafter, the court is deprived of discretion in the matter if creditors wait too long,¹⁰¹ hence prompt action on the part of the latter is not only essential to preserve their rights but is also highly desirable. Land titles ought not be held in abeyance while creditors speculate on whether a sale of the decedent's realty should be forced or not.

⁹⁶ Laws 1945, p. 2, H. B. 476; Ill. Rev. Stat. 1945, Ch. 3, § 366a.

⁹⁷ Laws 1945, p. 6, H. B. 529; Ill. Rev. Stat. 1945, Ch. 3, § 478.

⁹⁸ Ill. Rev. Stat. 1943, Ch. 3, § 478.

⁹⁹ Laws 1945, p. 3, H. B. 654; Ill. Rev. Stat. 1945, Ch. 3, § 379.

¹⁰⁰ See *People v. Lanham*, 189 Ill. 326, 59 N. E. 610 (1901). The former rule is restated in *In re Bergman's Estate*, 314 Ill. App. 154, 41 N. E. (2d) 115 (1942).

¹⁰¹ The same result has been reached on the ground of laches: *In re Neff's Estate*, 389 Ill. 625, 60 N. E. (2d) 204 (1945).

TRUSTS

Only one case pertaining to the law of trusts seems to possess significance.¹⁰² In *Pure Oil Company v. Byrnes*,¹⁰³ the Supreme Court declared that a lessee taking possession of land held by tenants in common for the drilling of oil must disclose to a co-tenant the existence of a producing well on the common property before taking a lease of the co-tenant's interest, particularly where such co-tenant was unaware of the existence thereof. Because the lessee there concerned had opportunity to make the disclosure but did not do so, it was held that the lessee could not claim it was a bona fide purchaser for value even though it paid a third party for the lease. As a consequence, the lessee was held to be a constructive trustee. The fiduciary relationship arose not merely from the fact that the lessee had become a tenant in common, for that alone was insufficient. The circumstances of the negotiations, the lack of knowledge on the part of the co-tenant, and the complete knowledge of all material facts by the lessee all justified the finding.

Of utmost importance is the new statute which has adopted the "prudent man" standard to guide trustees, no matter how appointed, in the retention or making of investments of trust funds.¹⁰⁴ While no deviation from the terms of the trust instrument is permitted to the trustee acting alone, the court is authorized, in proper cases, to permit deviation where necessary.¹⁰⁵ Another statute permits the investment of proceeds arising from eminent domain proceedings or partitions in other real estate by the trustee appointed to receive the same subject to the control of any court having equitable jurisdiction.¹⁰⁶

¹⁰² *Corwin v. Rheims*, 390 Ill. 205, 61 N. E. (2d) 40 (1945), has already been noted, ante p. 47. The problem inherent in the facts of *People ex rel. Kunstman v. Shinsaku Nagano*, 389 Ill. 231, 59 N. E. (2d) 96 (1945), noted in 23 CHICAGO-KENT LAW REVIEW 330, should receive the consideration of a lawyer involved in matters concerning trusts.

¹⁰³ 388 Ill. 26, 57 N. E. (2d) 356 (1944).

¹⁰⁴ Laws 1945, p. 1779, H. B. 280; Ill. Rev. Stat. 1945, Ch. 148, § 32 et seq.

¹⁰⁵ See an excellent discussion of the general problems involved by Nylund, *Investments by Trustees*, 20 CHICAGO-KENT LAW REVIEW 331 (1942).

¹⁰⁶ Laws 1945, p. 1780, H. B. 388; Ill. Rev. Stat. 1945, Ch. 148, § 34.

VII. PUBLIC LAW

ADMINISTRATIVE LAW

The decision of the Appellate Court in *People ex rel. Schutz v. Thompson*¹ invokes shades of the early Dental Examiner cases.² Relator there sought to compel the Department of Registration and Education to grant him access to the examination of candidates for licenses to practice medicine. His German license had been cancelled after twenty years of practice "because he was a non-Aryan." He presented to the Department his diploma as a doctor of medicine from the University of Breslau, as well as a copy of his license to practice. The Department denied him admission to the examination under a rule of long standing which required applicants to "submit complete transcripts of medical and premedical records with applications." Compliance with such rule was impossible because of chaotic conditions prevailing in Europe, of the existence of which the court took judicial notice. The lower court pronounced the rule of the Department unreasonable and granted mandamus. Its order was affirmed.

The general propriety of the holding would seem beyond question.³ It is not clear from the opinion, however, whether the order of mandamus compelled the Department simply to consider other evidence of qualifications or actually to admit relator to the examinations. If the latter, it would seem that the court was undertaking to resolve a matter entrusted to the Department. Section 5a of the Medical Practice Act,⁴ under which the relator claimed to be qualified, requires that the medical school from which applicant graduated must *inter alia* have been "reputable and in good standing in the judgment of the department." The court said that from the record before it, "it must be assumed that the colleges attended by the relator were reputable and in

¹ 325 Ill. App. 95, 59 N. E. (2d) 494 (1945).

² *People ex rel. Sheppard v. Illinois State Bd. of Dental Examiner*, 110 Ill. 180 (1884); *Illinois State Bd. of Dental Examiners v. People ex rel. Cooper*, 123 Ill. 227, 13 N. E. 201 (1887).

³ *People v. Love*, 298 Ill. 304, 131 N. E. 809 (1921); *People v. Kane*, 288 Ill. 235, 123 N. E. 265 (1919); *Kettles v. People*, 221 Ill. 221, 77 N. E. 472 (1906).

⁴ Ill. Rev. Stat. 1945, Ch. 91, § 5(1)(a).

good standing in the judgment of the department.”⁵ If such assumption be well-founded, the decision would seem to be brought within the doctrine of *Illinois State Board of Dental Examiners v. People ex rel. Cooper*,⁶ in which the petition alleged that the college there in question “has been recognized by the board of examiners as a reputable dental college and was so recognized when the relator presented his diploma.” Otherwise, the earlier case of *People ex rel. Sheppard v. Illinois State Board of Dental Examiners*⁷ would seem to control. The court, in that case, sustained a demurrer to a petition which had alleged that the college in question was reputable, rather than that the Board had found it to be such.⁸

Another current decision involving abuse of administrative discretion, this time reviewed by certiorari, was that of *Northwestern Institute of Foot Surgery and Chiropody v. Thompson*.⁹ The writ was issued to review the action of the Director of the Department of Registration and Education in removing the Institute from the list of schools approved by the Department as reputable and in good standing. The rules of the Department required a specified minimum number of doctors of medicine, chiropodists, etc., on the faculty, and the complaint filed charged that the teaching staff was not in accordance with these rules. The complaint was heard before a “Special Chiropody Committee,” upon the basis of whose recommendation the order under review was made. That “committee” found, among other things, that the Institute caused a catalog to be printed and presented to the department as correctly setting forth the required number of faculty members, and that the catalog was inaccurate and presented names of men who were not faculty members. The lower court ordered the writ quashed, but the Appellate Court reversed and ordered the return quashed for insufficiency. The court noted

⁵ 325 Ill. App. 95 at 102, 59 N. E. (2d) 494 at 498.

⁶ 123 Ill. 227, 13 N. E. 201 (1887).

⁷ 110 Ill. 180 (1884).

⁸ The statement of facts in the instant case indicates that the petition merely alleged that “the University of Breslau was a reputable medical college in good standing” within the meaning of the act: 325 Ill. App. 95 at 97, 59 N. E. (2d) 494 at 496.

⁹ 326 Ill. App. 439, 62 N. E. (2d) 42 (1945).

the total absence of facts to support the finding, characterized the finding as a mere "conclusion," and stated that the Institute was entitled to know specifically wherein it had failed to meet the requirements of the Department. The decision seems clearly correct. To have held otherwise would have been to make review by certiorari an illusory remedy.

Attention is also invited to the new Administrative Review Act,¹⁰ prescribing a uniform method for review of administrative decisions. The act provides for review by Circuit and Superior Courts which shall "extend to all questions of law and fact presented by the entire record before the court." It applies to judicial review of proceedings instituted after January 1, 1946, but then only to review the final decisions of any administrative agency where the act creating or conferring power on such agency, by express reference, adopts the provisions of the new statute. Where applicable, such review is exclusive. The act has already been made applicable, by such express reference, to more than forty different types of proceedings and is evidently intended to provide a uniform method of reviewing miscellaneous administrative decisions. The provision for judicial review of the facts, if it be understood literally, is revolutionary, and would, if so interpreted, jeopardize the validity of the act as applied to certain types of proceedings. It seems possible that the Supreme Court will interpret the provision as allowing substantially the scope of review permissible on certiorari. Not only would this obviate the attempt to confer non-judicial functions on the courts, but it would tend to preserve the prestige of administrative bodies and the integrity of the administrative process.

CONFLICTS OF LAWS

The only case of local significance in the field of conflicts of laws is that of *Moscow v. Mutual Life Insurance Company of New York*¹¹ wherein the Illinois Supreme Court apparently has had its first occasion to apply the 1939 statute calling for uniform

¹⁰ Laws 1945, p. 1144, S. B. 117; Ill. Rev. Stat. 1945, Ch. 110, §§ 264-279.

¹¹ 387 Ill. 378, 56 N. E. (2d) 399 (1944).

judicial notice of foreign laws.¹² The court not only gave full effect to the statute by taking judicial notice of the law of Pennsylvania, but also overruled its own decision in *Royal League v. Kavanagh*¹³ in order to follow a decision from an inferior court in Pennsylvania.¹⁴ In the earlier Illinois case, the court had enunciated the rule that the courts of this state should presume that the common law of a sister state is the same as that of Illinois in the absence of a decision to the contrary from a court of last resort in such sister state.¹⁵

The new rule laid down by the Supreme Court, to-wit: that it will follow decisions of courts of sister states inferior to the courts of last resort in determining matters of foreign law seems desirable and in general preferable to indulging in the common-law presumption. It is rather difficult to understand, however, why the court attributed its change of position to the 1939 statute. That act would seem merely to determine how the law of a sister state should be brought into the proceeding, that is as law rather than as fact. It makes no provision nor purports to effect any change with respect to the type of legislative or judicial act which shall constitute the "law" of a sister state. It is possible that the court was influenced by a changed attitude on the part of the federal courts¹⁶ since the decision in *Erie Railroad Company v. Tompkins*¹⁷ for it quoted with approval from another Federal Supreme Court case to the effect that where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is "a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."¹⁸

¹² Ill. Rev. Stat. 1945, Ch. 51, §§ 48g-48n.

¹³ 233 Ill. 175, 84 N. E. 178 (1908).

¹⁴ *Farmers Trust Co. v. Reliance Life Ins. Co.*, 140 Pa. Super. 115, 13 A. (2d) 111 (1940).

¹⁵ It was there declared that "this court cannot, in advance of its announcement by the Supreme Court of Missouri, assume that the common law in that State will be declared to be different from the common law as construed in this State." 233 Ill. 175 at 184, 84 N. E. 178 at 181.

¹⁶ See annotation in 132 A. L. R. 964 (1940).

¹⁷ 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

¹⁸ *West v. American Telep. & Teleg. Co.*, 311 U. S. 223 at 237, 61 S. Ct. 179 at 183, 85 L. Ed. 139 at 144 (1940).

CONSTITUTIONAL LAW

Three statutes failed to meet constitutional tests when subjected to judicial scrutiny during the past year. In *McDougall v. Lueder*,¹⁹ although the court sustained the general validity of the Community Currency Exchange Act,²⁰ it invalidated one provision thereof for being so indefinite as to confer upon the Auditor of Public Accounts "arbitrary, unlimited and unrestrained power."²¹ Other objections to the effect that by excepting certain express and telegraph companies an unreasonable classification had been developed;²² that prohibiting exchanges from accepting deposits amounted to a denial of equal protection;²³ and that there had been an unconstitutional delegation of legislative power,²⁴ were overruled.

The Professional Engineering Act²⁵ was invalidated in *Krebs v. Thompson*²⁶ because the definition of "professional engineering" was found to be so inadequate that the determination as to just who was engaged in that occupation was, in fact, left to the unguided judgment of the Department of Registration and Education, thereby involving an unconstitutional delegation of legislative power to an administrative officer. A more specific definition for the phrase "professional engineering" was written into the new act adopted at the last session of the legislature.²⁷

In the third instance, that of *People ex rel. Gallenbach v. Franklin*,²⁸ the Illinois Supreme Court invalidated a 1943 statute

¹⁹ 389 Ill. 141, 58 N. E. (2d) 899 (1945).

²⁰ Laws 1943, Vol. 1, p. 233; Ill. Rev. Stat. 1945, Ch. 16½, § 31 et seq.

²¹ Subsection (c) of Section 4, Ill. Rev. Stat. 1943, Ch. 16½, § 34(c), required an application for a license to do business to contain "such other information as the Auditor may require." As amended by Laws 1945, p. 367, S. B. 106, Ill. Rev. Stat. 1945, Ch. 16½, § 34(c), the requirement is now much more specific.

²² The court held the classification reasonable on the ground that the act was intended to regulate only companies of a purely local character.

²³ This provision was deemed reasonable because it prevented such exchanges from engaging in the banking business without being subject to the special regulations and responsibilities attendant thereto.

²⁴ The court found that sufficient standards were enunciated in the act itself to control the discretion delegated to the Auditor to supervise its operation or to promulgate rules thereunder.

²⁵ Laws 1941, Vol. 1, p. 443; Ill. Rev. Stat. 1943, Ch. 48½, § 1 et seq.

²⁶ 387 Ill. 471, 56 N. E. (2d) 761 (1944).

²⁷ Laws 1945, p. 844, H. B. 337; Ill. Rev. Stat. 1945, Ch. 48½, §§ 32-61.

²⁸ 388 Ill. 560, 58 N. E. (2d) 555 (1945).

designed to provide for the creation and maintenance of a fireman's annuity and benefit fund for municipalities of 10,000 to 100,000 inhabitants.²⁹ Violation of the state constitution was said to have occurred because the act attempted to grant the power to assess and collect taxes to persons who were not the corporate authorities of the municipalities involved.³⁰ The annuity and benefit funds were to have been raised by salary deductions and by contributions from taxes levied in such cities. The amounts to be paid by the cities were to be determined by acts of local Retirement Boards,³¹ by the "annual convention"³² and by the Supervisory Board.³³ The court observed, when invalidating the act, that the "power to create a debt to be discharged by taxation is substantially the same thing as the power to impose a tax."³⁴

Two federal cases involving questions of admission to the practice of law in Illinois may be noticed briefly. *Brents v. Stone*³⁵ is of interest because of the bizarre nature of the suit rather than by reason of legal significance. An action for declaratory judgment was there instituted against the justices of the Supreme Court of Illinois to obtain a decision that the rules adopted by the court governing admission to the bar deprived plaintiff of the right to practice law, said to be a privilege guaranteed and protected by the federal constitution. Plaintiff did not aver that he had requested or been denied the right to take the bar examination, but merely that he had applied to the Supreme Court for admission, presenting a certificate of good moral character, and had been refused admission. The district court, observing that a license to practice law is not a privilege within the purview of any constitutional provision,³⁶ sustained

²⁹ Laws 1943, Vol. 1, p. 327; Ill. Rev. Stat. 1943, Ch. 24, § 944.66 et seq.

³⁰ See Ill. Const. 1870, Art. IX, § 9.

³¹ Such boards were to consist of the mayor, the city treasurer, and three firemen.

³² Attended by one delegate, a fireman, elected by each local Retirement Board.

³³ Elected by the annual convention.

³⁴ 388 Ill. 560 at 575, 58 N. E. (2d) 555 at 562.

³⁵ 60 F. Supp. 82 (1945).

³⁶ Citing, among other decisions, *Bradwell v. Illinois*, 83 U. S. (16 Wall.) 130, 1 L. Ed. 442 (1873).

a motion to dismiss the complaint because it was a suit against the state in violation of the Eleventh Amendment.

The decision in *In re Summers*³⁷ is much more significant. The United States Supreme Court granted certiorari to review the action of the Illinois Supreme Court in denying petitioner's prayer for admission to practice in Illinois, which denial was said to be predicated on the sole ground that he was a conscientious objector to war. Although the petitioner had successfully passed the bar examination, he had been denied the requisite certificate of good moral character.³⁸ The Illinois court likewise denied a petition for admission, sustaining the opinion of the Committee on Character and Fitness. With four justices dissenting, the United States Supreme Court affirmed that action.

Petitioner contended that his exclusion from the bar amounted to a violation of the due process clause of the Fourteenth Amendment, insofar as that clause protected him against state action in violation of the principles of the First Amendment.³⁹ Without indicating to what extent, if at all, the First Amendment is applicable to state action, the court assumed that an attempt to exclude members of a religious group from the practice of law, merely because they were such, would be unconstitutional. It can be inferred, however, that the court was thinking in terms of the "equal protection" rather than the "due process" clause of the Fourteenth Amendment, for it said: "We cannot say that any such purpose to discriminate moti-

³⁷ — U. S. —, 65 S. Ct. 274, 89 L. Ed. (adv.) 1304 (1945).

³⁸ The secretary of the Committee on Character and Fitness had embodied his views in an unofficial letter, reading in part as follows: "I think the record establishes that you are a conscientious objector—also that your philosophical beliefs go further. You eschew the use of force regardless of circumstances but the law which you profess to embrace and which you teach and would practice is not an abstraction observed through mutual respect. It is real. It is the result of experience of man in an imperfect world, necessary we believe to restrain the strong and protect the weak. It recognizes the right even of the individual to use force under certain circumstances and commands the use of force too obtain its observance . . . I do not argue against your religious beliefs or your philosophy of nonviolence. My point is merely that your position seems inconsistent with the obligations of an attorney at law."

³⁹ U. S. Const., Amend. I, declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

vated the action of the Illinois Supreme Court.”⁴⁰ The court also referred to the fact that Illinois has a constitutional provision which requires service in the militia in time of war of men of the petitioner’s age group,⁴¹ and noted that the United States denies citizenship to aliens who refuse to pledge military service.⁴² From these facts, the majority concluded that insistence that an officer charged with the administration of justice take an oath to support the state constitution and indicate a willingness to perform military service did not violate principles of religious freedom.

Mr. Justice Black, in a dissenting opinion, stated that “if Illinois can bar this petitioner from the practice of law it can bar every person from every public occupation solely because he believes in non-resistance rather than force.”⁴³ Decrying the use of the test oath, he relied on dissenting opinions in *United States v. Schwimmer*⁴⁴ and *United States v. Macintosh*.⁴⁵ It was in the second of these cases that the power of the United States to draft conscientious objectors for military duty and to punish them for a refusal to serve as soldiers was recognized, although the case actually involved a denial of naturalization to one who refused to take an oath to bear arms.

MUNICIPAL CORPORATIONS

Cases which may have far-reaching consequences in the field of municipal law were passed upon during the judicial year just closed. They deal, however, with a wide variety of topics. Thus, the validity of a lease of a portion of public lands was involved in *Lincoln Park Traps v. Chicago Park District*.⁴⁶ The lessee, a private club, there sought injunction to prevent a forfeiture of the lease and a threatened ouster, claiming that (a) the lease was valid and enforceable, or (b) if not, that estop-

⁴⁰ — U. S. — at —, 65 S. Ct. 274, 89 L. Ed. (adv.) 1304 at 1310.

⁴¹ Ill. Const. 1870, Art. XII, § 1. But see also Art. XII, § 6.

⁴² *United States v. Schwimmer*, 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889 (1929); *United States v. Macintosh*, 283 U. S. 605, 51 S. Ct. 570, 75 L. Ed. 1302 (1931).

⁴³ — U. S. — at —, 65 S. Ct. 274, 89 L. Ed. (adv.) 1304 at 1312.

⁴⁴ 279 U. S. 644 at 653, 49 S. Ct. 448 at 451, 73 L. Ed. 889 at 893.

⁴⁵ 283 U. S. 605 at 627, 51 S. Ct. 570 at 576, 75 L. Ed. 1302 at 1311.

⁴⁶ 323 Ill. App. 107, 55 N. E. (2d) 173 (1944).

pel prevented a forfeiture because of expenditures made for valuable improvements in reliance on the lease. The court determined that it was error to grant an injunction because public grounds could not be leased to private individuals,⁴⁷ and the doctrine of estoppel had no application to the exercise of governmental functions.⁴⁸

An interesting case concerning the tort liability of a municipality may be found in *Pickett v. City of Hillsboro*⁴⁹ where a demented park concessionaire shot and killed a young lad while he was swimming in a municipal pool. Recovery for the wrongful death was denied on the theory that the operation and maintenance of a public park amounted to a governmental function. One count in the complaint, however, charged that the city was maintaining a dangerous nuisance in permitting the concessionaire to remain on the premises. Although the court denied that the facts constituted an actionable nuisance in the light of the holding in *Craig v. City of Charleston*,⁵⁰ the soundness of the opinion in this respect may be open to question.

The right of a *de jure* civil service employee to recover his full salary accruing in the interim between the issuance of a peremptory writ of mandamus and the time when the same was affirmed on appeal was vindicated in *Corbett v. City of Chicago*.⁵¹ Despite the fact that the city had paid the salary to a *de facto* employee who had performed the services, and despite the fact that it claimed that to permit recovery would penalize it for having taken an appeal, it was held that only by granting recovery could the right of the civil service employee be properly protected.

⁴⁷ *McPike v. Illinois Terminal R. Co.*, 305 Ill. 298, 137 N. E. 235 (1922).

⁴⁸ Estoppel was also urged, in *Newberry Library v. Board of Education*, 390 Ill. 48, 60 N. E. (2d) 552 (1945), as a ground for preventing the municipal corporation there concerned from protesting the validity of certain refunding bonds. The estoppel was said to rest in certain recitals contained in such bonds. The court held that total lack of power could not be remedied by any recital of the existence thereof.

⁴⁹ 323 Ill. App. 235, 55 N. E. (2d) 306 (1944).

⁵⁰ 180 Ill. 154; 54 N. E. 184 (1899), affirming 78 Ill. App. 312 (1898).

⁵¹ 323 Ill. App. 429, 55 N. E. (2d) 717 (1944), noted in 23 CHICAGO-KENT LAW REVIEW 268. On leave to appeal, the Illinois Supreme Court affirmed the holding: 391 Ill. 96, 62 N. E. (2d) 693 (1945), not in the period of this survey.

Questions arising under zoning ordinances also reached the reviewing courts. In *Salem v. Hogan*,⁵² the county ordinance permitted a "picnic grove" in a restricted area while forbidding any "regular business development." Certiorari was denied to a farmer who had converted a barn into a recreational center because the court concluded that the premises, as so converted, were more than just a picnic grove. *Douglas v. Village of Melrose Park*⁵³ involved the point as to whether or not a non-conforming use had been discontinued so as to prevent a renewal thereof. A small factory had there been vacant for some time while the owner was trying to locate a suitable tenant. The court held that the word "discontinued," as used in the ordinance, was the equivalent to "abandoned," hence involved elements of intention as well as of cessation of use. As the owner had no such intention to discontinue, injunction to prevent the interference with a renewal of the use was granted. The third significant case was that of *Mercer Lumber Companies v. Village of Glencoe*.⁵⁴ It was there held proper for a municipality to place limitations upon the extent to which alterations or additions might be made to non-conforming uses in the interest of producing their eventual extinction. *Lee v. City of Chicago*⁵⁵ illustrates how a valid general zoning ordinance may be made to operate so unreasonably in a given situation as to warrant an injunction against its enforcement. The plaintiff there desired to erect a theater in a commercial zone but was denied a permit because the building would be within a prohibited distance from a seminary or "building used exclusively for educational purposes." When plaintiff showed that there were many taverns located much closer, so that the purpose of the ordinance had failed, the court granted injunction.⁵⁶

Licensing powers were involved in two cases. Section 23—75

⁵² 323 Ill. App. 558, 56 N. E. (2d) 663 (1944).

⁵³ 389 Ill. 98, 58 N. E. (2d) 864 (1945).

⁵⁴ 390 Ill. 138, 60 N. E. (2d) 913 (1945), noted in 23 CHICAGO-KENT LAW REVIEW 349.

⁵⁵ 390 Ill. 306, 61 N. E. (2d) 367 (1945).

⁵⁶ The court said: "Merely because the property is within the letter of the ordinance does not mean that it is still to be enforced even though the situation is outside the purpose of the law." 390 Ill. 306 at 311, 61 N. E. (2d) 367 at 369.

of the Cities and Villages Act⁵⁷ empowers municipalities to regulate and prevent the storage of "turpentine, tar, pitch, resin" and other similar combustibles or explosive materials. The section was held sufficiently broad, in *Edward R. Bacon Grain Company v. City of Chicago*,⁵⁸ to sustain an ordinance providing for the licensing and inspection of grain elevators at a substantial fee as being necessary to protect the city against fire hazard. There was no indication, though, as to how the payment of the large fee would accomplish that purpose. On the other hand, it was held in *Arnold v. City of Chicago*⁵⁹ that the statute permitting the regulation of the business of money-changing⁶⁰ was not broad enough to permit a city to license currency exchanges.

A municipal ordinance of Kankakee declared it to be a public nuisance for any person to allow the emission of "dense smoke" except for periods aggregating six minutes in any one hour. By that ordinance, the building inspector was authorized to "summarily abate" any condition constituting a violation thereof. The lack of adequate standards together with the arbitrary basis for administrative action justified the decision in *City of Kankakee v. New York Central Railroad Company*⁶¹ that such ordinance was invalid.

Several statutes purporting to vest additional powers in municipal governments were tested on constitutional grounds. The Municipal Airport Act⁶² was declared invalid in *People ex rel. Greening v. Bartholf*⁶³ because it vested taxing powers in the hands of others than the representatives of the persons to be taxed in violation of Section 9 of Article IX of the state constitution.⁶⁴ Similar criticism was also successfully directed against a statute creating a fireman's annuity and benefit fund

⁵⁷ Ill. Rev. Stat. 1945, Ch. 24, § 23—75.

⁵⁸ 325 Ill. App. 245, 59 N. E. (2d) 689 (1945).

⁵⁹ 387 Ill. 532, 56 N. E. (2d) 795 (1944).

⁶⁰ Ill. Rev. Stat. 1945, Ch. 24, § 23—91.

⁶¹ 387 Ill. 109, 55 N. E. (2d) 87 (1944).

⁶² Laws 1943, Vol. 1, p. 212; Ill. Rev. Stat. 1943, Ch. 15½, § 49 et seq.

⁶³ 388 Ill. 445, 58 N. E. (2d) 172 (1944), noted in 39 Ill. L. Rev. 413.

⁶⁴ The legislature subsequently adopted a new statute on the subject: Laws 1945, p. 290, S. B. 10; Ill. Rev. Stat. 1945, Ch. 15½, § 68.1 et seq.

in cities with a population in excess of 10,000 but under 100,000 in population.⁶⁵ Of larger social interest, however, was the outcome of the attack on the Neighborhood Redevelopment Law⁶⁶ made in the case of *Zurn v. City of Chicago*.⁶⁷ That portion of the statute which permitted the condemnation of private property for housing projects received the brunt of the criticism but the statute was upheld when the court observed that this had been declared to be a public purpose by the legislature and the judicial department would not inquire into the propriety of that declaration.⁶⁸

A novel problem of workmen's compensation for municipal employees was presented in *City of Chicago v. Industrial Commission*.⁶⁹ A clerk of election had received an injury to his eye while performing his functions. Claim for compensation was contested on the ground that injury was not compensable or, if it was, that the burden fell upon either the election board or the county government rather than on the city. Compensation was upheld and the burden thereof was placed on the city on the theory that although the injured person was hired by the election board he was really the employee of the city for which the duties were performed. There is doubt about the validity of such reasoning.⁷⁰

PUBLIC UTILITIES

The Illinois Supreme Court has handed down two decisions affirming in strong language the principle of segregation of suburban operations of an interstate carrier for rate-making purposes. In one of them, that of *Illinois Central Railroad Company v. Illinois Commerce Commission*,⁷¹ the Supreme Court

⁶⁵ *People ex rel. Gallenbach v. Franklin*, 388 Ill. 560, 58 N. E. (2d) 555 (1945). The statute concerned was Laws 1943, Vol. 1, p. 327; Ill. Rev. Stat. 1943, Ch. 24, § 944.66 et seq.

⁶⁶ Laws 1941, Vol. 1, p. 431; Ill. Rev. Stat. 1945, Ch. 32, § 550.1 et seq.

⁶⁷ 389 Ill. 114, 59 N. E. (2d) 18 (1945), noted in 39 Ill. L. Rev. 338.

⁶⁸ Murphy, J., dissented on the basis of generally accepted views as to what constituted a "public purpose" in matters of eminent domain.

⁶⁹ 389 Ill. 411, 59 N. E. (2d) 805 (1945).

⁷⁰ See Esling, *The Relationship Between Municipal Employment and Workmen's Compensation*, 21 CHICAGO-KENT LAW REVIEW 209 (1943).

⁷¹ 387 Ill. 256, 56 N. E. (2d) 432 (1944), noted in 33 Ill. B. J. 236.

affirmed a decision of the Superior Court of Cook County setting aside an order of the Illinois Commerce Commission denying proposed increases in suburban rates. The railroad had filed proposed tariffs back in 1925 for a twenty per cent. increase in suburban intrastate rates to correspond with a similar increase granted railroads generally on interstate traffic. The state commission denied the proposed increase, although it did grant one for fifteen per cent. The railroad then obtained a federal injunction, in 1928, against interference with its plans and, under the protection thereof, put the proposed rate increase into effect. Thereafter, the Interstate Commerce Commission granted another general increase of ten per cent. to railroads throughout the country and the company filed suburban tariffs setting forth such increase. The state commission suspended them as it did similar tariffs of other roads. One of the other roads enjoined state action on the ground that the order of the federal commission had superseded the jurisdiction of the state body. On appeal therefrom, the Supreme Court of the United States held that the Interstate Commerce order did not apply to intrastate commutation rates in the Chicago area.⁷² In the meantime, the suspension order of the Illinois commission had been appealed to the Superior Court of Cook County and there had been set aside. Appeal to the Illinois Supreme Court followed with the result indicated.

In passing upon the questions raised by the appeal, the court held that the railroad was not required to give notice to the Federal Emergency Price Administrator because the proceedings were instituted, the taking of evidence concluded, and the case taken by the commission before the provisions of the Emergency Price Control Act requiring such notice had become effective and that statute was not retroactive. It also held that, as the railroad had voluntarily reduced its rates in 1936, it had thereby abandoned the maximum rates originally fixed by the permanent injunction in 1928, inasmuch as an injunction does

⁷² See *Illinois Commerce Commission v. Thomson*, 318 U. S. 675, 63 S. Ct. 834, 87 L. Ed. 1075 (1943).

not create but merely protects rights and is always subject to adaptation as events require.

Upon consideration of the question of whether or not the commission's order was unreasonable or unlawful, the Illinois Supreme Court scrutinized the evidence, all of which was offered by the railroad, and concluded that the commission was fundamentally wrong as a matter of law in refusing to consider the suburban service of the road as separate from the system service.⁷³ Having concluded that the commission disregarded a fundamental rule of law by wrongfully refusing to consider the evidence showing the suburban service to be segregated and separate from system service, it followed that the finding that, as the entire system's net revenue provided a reasonable return on the system investment, it was immaterial whether the revenue derived from suburban service was sufficient to pay operating expenses or a fair return on the reasonable value of the property devoted to such service, was clearly against the weight of the evidence. As a consequence, the order of the commission could not be sustained.

*Fleming v. Illinois Commerce Commission*⁷⁴ was the other case involving the fixing of suburban rates. Several railroads had appealed from orders of the Illinois Commerce Commission denying their proposed increases in suburban rates. In each case, the Circuit Court of Cook County had affirmed the commission's action. Appeals taken to the Supreme Court were consolidated and that court reversed and remanded as to all the railroads except one. The court carefully considered the evidence as to the character of the suburban service rendered by the successful appellants, the substantial deficit in income from that service, the apportionment of expense to and the value of the facilities used in such suburban service and, following the same reasoning as in the Illinois Central rate case previously mentioned, held that the commission's orders could not be sus-

⁷³ The court cited *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585, 35 S. Ct. 429, 59 L. Ed. 735 (1915), among other cases, and also the famous *Smyth v. Ames*, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898), on the question of segregation of services by a carrier in relation to values.

⁷⁴ 388 Ill. 138, 57 N. E. (2d) 384 (1944).

tained. The unsuccessful appellant was primarily a terminal company, the evidence as to it substantially supported the finding of the commission, and because it had not met the burden of showing that the proposed rates were not unreasonable, the order as to it was affirmed.

The necessity of notice to the Office of Price Administration was also raised in *Pullman Company v. Illinois Commerce Commission*.⁷⁵ That company had filed schedules of proposed increases in rates to go into effect on April 25, 1942, and later. The new rates were suspended by the commission for successive periods although hearings were held. Before the expiration of the last suspension, an order was entered which found the proposed increases unlawful and required the proposed tariffs to be cancelled. That order stated that the carrier had failed to give requisite notice to the Office of Price Administration of the intention to increase the rates and to consent to timely intervention by that Office. Petition for rehearing was filed alleging that such notice had been given and that no intervening petition had thereafter been filed, but such petition was denied. The Superior Court of Cook County found that the order of the commission did not contain sufficient findings; that there was no evidence to support the findings made; that the order was against the manifest weight of the evidence; that the former rates which the cancellation would leave in effect were confiscatory; and that the commission had exceeded its powers in making the order.

The commission took the matter to the Illinois Supreme Court. That court found that the Emergency Price Control Act of 1942, as amended, did not justify the commission's order because the amendment of October 2, 1942, requiring notice was not retroactive, particularly so where the hearings before the commission had been concluded prior to the effective date of the amendment. The failure to give notice was said not to affect a jurisdiction which had been lawfully acquired. Criticism was also directed to the commission for not having intimated,

⁷⁵ 390 Ill. 40, 60 N. E. (2d) 232 (1945).

prior to the entry of its order, that the question of compliance with the Price Control Act was under consideration as well for failure to make findings of fact either for or against the reasonableness of the proposed rates. No evidence was presented before the commission on the point of whether or not notice had been given to the Office of Price Administration. If the commission had decided that relatively simple question with reasonable dispatch, its order as to the reasonableness of the rates would have been filed before the date of the amendment of the Price Control Act. It was held that the commission had not performed its statutory duty, to-wit: to determine the reasonableness of the new rates, but had instead held them invalid upon a ground it lacked authority to consider. Facts conceivably known to the commission but not placed in evidence were no basis on which to support an order.⁷⁶ The court also pointed out that a hearing before the commission is "not a partisan hearing with the commission on one side arrayed against the utility on the other, but . . . it is, instead, an administrative investigation instituted for the purpose of ascertaining and making findings of fact."⁷⁷

The mere fact that rates on electric current were lowered to meet competition was held insufficient, in *Wedron Silica Company v. Illinois Commerce Commission*,⁷⁸ to prove that a utility had been charging an excessive rate. A complaint had been made by a customer of the utility on the ground that it had charged a discriminatory rate. After hearing, the commission dismissed the complaint for lack of proof. The circuit court set aside the commission's order. An appeal followed. Electric current was sold by the utility under several different schedules of rates for industrial users in different localities. The rate charged the complainant applied without regard to territorial restrictions although lower rates were available in restricted communities to meet competition from another utility operating in these areas. It appeared from the evidence that the com-

⁷⁶ The court cited *Rockwell Lime Co. v. Commerce Commission*, 373 Ill. 309, 26 N. E. (2d) 99 (1940).

⁷⁷ 390 Ill. 40 at 46, 60 N. E. (2d) 232 at 235.

⁷⁸ 387 Ill. 581, 57 N. E. (2d) 349 (1944).

plainant was not located in any one of the restricted areas and the commission found that reducing all rates to the same level as those charged in the areas of competition would result in serious loss. It concluded that no unjust discrimination existed in the absence of evidence tending to show that the cost of producing and delivering energy in the two areas was the same or that they disclosed comparable conditions. That view was upheld on the ground that unjust discrimination is not proved by a mere comparison of rates fixed in different schedules without evidence showing the conditions to be the same in both areas.

In *St. Clair Housing Authority v. Southwestern Bell Telephone Company*,⁷⁹ the court faced a question as to whether or not a city could grant a franchise to a public utility giving it an interest in streets and alleys which would last beyond the time the streets and alleys were used by the public. The housing authority there concerned, through purchase and eminent domain, had acquired title to land abutting on certain streets and alleys along which the defendant maintained poles and wires pursuant to franchises granted it. Some of these streets and alleys were vacated by the city at the request of the housing authority. Defendant refused to remove its property from such vacated streets so plaintiff instituted suit. The lower court found for the defendant on its claim that the franchise ordinance had vested it with a perpetual easement. Direct appeal was taken to the Supreme Court on the principle that a perpetual easement acquired by grant constitutes a freehold.

The ordinances under which the defendant operated contained no provision as to the duration of the grant but the conditions imposed required free telephone service for certain city offices. It was stipulated that the ordinances were still in force and effect and that defendant provided the free telephone service. Plaintiff had acquired whatever title it had to the former streets and alleys by ownership of the lots abutting thereon and also by the ordinance vacating them which contained the words "subject to all present legal rights, if any, of any public utility companies

⁷⁹ 387 Ill. 180, 56 N. E. (2d) 357 (1944), noted in 39 Ill. L. Rev. 427.

therein and thereto." Plaintiff contended that the vacation by the city was an exercise of the police power and that the council had no right to grant a franchise which would restrict later exercise of such police power in the interests of society and the public.

The Supreme Court reversed a finding for defendant and remanded the case with directions to grant leave to either party to make the city a party to the proceeding, holding the city to be a necessary party even though that point had not been raised by the litigants. While not passing on the merits of the case, the opinion points out that where streets and alleys come into public use through a common-law dedication, title remains in the abutting property owners subject to the easement of the public,⁸⁰ whereas if they come into public use by the city's acceptance of a statutory dedication of the plat, then the city's title is that of a base or determinable fee, subject to being defeated whenever public use ceases.⁸¹ This creates a doubt either as to the city's ability to execute a franchise outlasting its vacation of the streets, or as to the city's ability to vacate after it has once executed such a franchise. After the city has been made a party, the case will presumably be brought before the court again on review for a clarification of these points and a resolution of the doubts.

Plenary and exclusive jurisdiction over railroad grade crossings, in the exercise of the police power, is vested in the Illinois Commerce Commission according to the holding in *Illinois Central Railroad Company v. Franklin County*.⁸² That case also clarifies an apparent conflict in statutory provisions on the subject. The railroad there concerned filed a petition before the commission to require Franklin County and others to renew and improve, or in the alternative, to abandon two overhead highway bridges over the company's tracks in that county. The commission found that the volume of traffic and other conditions did not warrant a renewal of one of the bridges but did

⁸⁰ *Sullivan v. Atchison, T. & S. F. R. Co.*, 251 Ill. 108, 95 N. E. 1081 (1911).

⁸¹ *Prall v. Burckhardt*, 299 Ill. 19, 132 N. E. 280 (1921).

⁸² 387 Ill. 301, 56 N. E. (2d) 775 (1944).

as to the other. The cost of such renewal was apportioned equally between the railroad and the county. On rehearing, a re-apportionment of cost was ordered and the railroad was directed to pay sixty per cent. thereof. The circuit court set aside the order of the commission, and the railroad appealed.

The only question was as to the lawfulness and reasonableness of the order for apportionment. The railroad contended this was a valid exercise of the police power while the county claimed it was invalid for want of power in the commission by reason of language in Section 58 of the Public Utilities Act⁸³ and also because of a provision in the statute relating to fencing and operation of railroads.⁸⁴

Section 58, when enacted in 1913, provided in its first paragraph that no public highway should be constructed across a railroad without permission from the commission but subject to the proviso that "this section shall not apply to the replacement of lawfully existing roads, highways and tracks." The second paragraph thereof directed that grade separations and crossings could be required with power in the commission to apportion the cost of such. In 1917, that section was amended to give the commission power to require reconstruction and improvements of crossings as well as to apportion the cost.

The county claimed that the proviso in the original act carried over into the amended act and withheld from the commission all power over existing highway crossings over railroads and replacements of crossings over existing tracks. The Supreme Court disagreed with that contention and held that the proviso only meant that permission of the commission was not required for replacement of lawfully existing crossings and did not affect its power to apportion the cost.

Section 8 of the act in relation to fencing and operating railroads merely restated the duty imposed on the railroads by common law, requiring them to construct and maintain highway crossings on their rights of way. Being enacted in 1874, it was

⁸³ Ill. Rev. Stat. 1945, Ch. 111½, § 62.

⁸⁴ Ibid., Ch. 114, § 62.

superseded by the later Public Utilities Act. As the acts are so inconsistent that both cannot operate, the repugnant provisions of the earlier statute had to yield to the provisions of the later one dealing with the same subject matter. Language in *Henderson County v. Chicago, Burlington & Quincy Railroad Company*,⁸⁵ which may indicate that the duty of a railroad is not modified by the Public Utilities Act, is not to be followed. As the commission had been given clear power to do what it did, and as the proviso that the costs of apportionment shall include certain costs does not restrict the power to apportion to the items enumerated but enlarges the general expression of what costs may be so apportioned, the order of the commission was upheld.

TAXATION

By its decision in the second *Barnett* case,⁸⁶ the Illinois Supreme Court has again invalidated a statute attempting to provide for "pre-adjudication" of tax levies in Cook County.⁸⁷ As in the two preceding cases,⁸⁸ the ground for invalidation was the denial of due process, *i.e.*, that taxpayers would be precluded by the proceedings without having received adequate notice thereof. The present statute was the fourth attempt⁸⁹ of the legislature to meet this very important problem; each successive statute being designed to obviate specific defects found to justify prior invalidations. The principal feature of the instant statute was a requirement for the mailing of notice, at least fifteen days before the return date, to the "taxpayers in the territorial limits of the municipal corporation, quasi municipal corporation or taxing body whose annual levies are being ad-

⁸⁵ 320 Ill. 608, 151 N. E. 542 (1926).

⁸⁶ *Barnett v. County of Cook*, 388 Ill. 251, 57 N. E. (2d) 873 (1944), noted in 39 Ill. L. Rev. 407.

⁸⁷ Laws 1943, Vol. 1, p. 1103; Ill. Rev. Stat. 1943, Ch. 120, §§ 831-41.

⁸⁸ *Griffin v. County of Cook*, 369 Ill. 380, 16 N. E. (2d) 906, 118 A. L. R. 1157 (1938), invalidating Laws 1937, p. 1019, noted in 18 CHICAGO-KENT LAW REVIEW 66, 6 U. of Chi. L. Rev. 326; *Barnett v. County of Cook*, 373 Ill. 516, 26 N. E. (2d) 862 (1940), declaring Laws 1939, p. 848, unconstitutional, noted in 19 CHICAGO-KENT LAW REVIEW 82.

⁸⁹ A third statute, S. B. 198 (1941), had been vetoed by the Governor upon an opinion of invalidity furnished by the Attorney-General.

justed.”⁹⁰ The Supreme Court found a number of faults with the adequacy of such notice, but the gist of them was that it was practically impossible to make up a list of *current* taxpayers and their addresses. The position taken would seem to indicate that further attempts to secure “pre-adjudication” would be futile.

Schreiber v. County of Cook,⁹¹ however, sustained the validity of the so-called “Scavenger Act,” which requires the county collector to offer for sale for unpaid taxes all property upon which a part or all of the general taxes for each of ten or more years are delinquent.⁹² Provision is made therein for the inclusion of delinquent special assessments upon written request of taxing districts levying the same. The property may be sold for less than the full amount due and, upon confirmation, the sale extinguishes the lien of all general taxes, special taxes and special assessments for which judgment has been entered as well as all forfeitures therefor. The state or any taxing district may bid at the sale, and if the county acquires the property it is to hold the same as trustee for all taxing district interested, including the state. The statute also provides that redemption from sale does not revive the lien or forfeiture.

Various objections to the constitutionality of the act were urged but all were overruled. To the claim that the applicability thereof only to property on which taxes were in default for ten years involved an arbitrary classification, the court replied that classification based on a time period is reasonable. To the contention that the effect of the act was to destroy the equality of taxation required by the Illinois Constitution,⁹³ the court noted that absolute equality is impracticable so that incidental inequalities do not invalidate.⁹⁴ The argument that the act con-

⁹⁰ Laws 1943, Vol. 1, p. 1105; Ill. Rev. Stat. 1943, Ch. 120, § 834.

⁹¹ 388 Ill. 297, 58 N. E. (2d) 40, 155 A. L. R. 1162 (1944).

⁹² Laws 1943, Vol. 1, p. 1075; Ill. Rev. Stat. 1943, Ch. 120, § 716a.

⁹³ Ill. Const. 1870, Art IX, § 1: “. . . so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. . . .”

⁹⁴ The court said, 388 Ill. 297 at 303, 58 N. E. (2d) 40 at 43, that: “Inequalities that result occasionally and incidentally in the application of a system that is not arbitrary in its classification and not applied in a hostile and discriminatory manner, are not sufficient to defeat the tax.”

travened Section 6 of Article IX of the Constitution⁹⁵ was refuted on the ground that such section has application only to a release of all state taxes for an entire taxing unit.⁹⁶ An alleged violation of Section 22 of Article IV,⁹⁷ brought about by subordinating the lien of general taxes to the lien of special assessments, was overcome by indicating that such section applies only to private corporations.⁹⁸ Criticism that the provision for selling for less than the total amount due on unpaid special assessments impaired the obligation of a contract,⁹⁹ that is the contract of the assessment bonds, was answered when the court said that the fatal weakness in that argument lay in the fact that the judgment of confirmation of an assessment in a local improvement proceeding, on which the delinquency judgment was to be predicated, was not a contract.¹

Two "inclusion-exclusion" cases concerning the operation of office buildings and the like may be worthy of brief mention. In *Liberty National Bank of Chicago v. Collins*,² the Supreme Court held that the owner of a building who, under lease agreements, furnished electricity to the tenants of the premises, is engaged in the business of selling electricity for use and consumption within the provisions of the Public Utilities Revenue Act of 1937,³ hence liable to pay the tax thereby imposed. It should be noted that the owner of the building was there actually "billing" tenants for electricity and not merely furnishing the same as an incidental service. In *Theo. B. Robertson Products Company v. Nudelman*,⁴ however, the court held that where sales of paper products, soap and the like, are made to hotels, office

⁹⁵ That section directs: "The general assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatever."

⁹⁶ *Raymond v. Hartford Fire Ins. Co.*, 196 Ill. 329, 63 N. E. 745 (1902).

⁹⁷ Ill. Const. 1870, Art. IV, § 22, denies to the general assembly the power to pass local or special laws in certain enumerated instances.

⁹⁸ See *People v. Green*, 382 Ill. 577, 47 N. E. (2d) 465 (1943).

⁹⁹ Ill. Const. 1870, Art. II, § 14.

¹ 388 Ill. 297 at 309, 58 N. E. (2d) 40 at 46, citing *Hoehamer v. Village of Elmwood Park*, 361 Ill. 422, 198 N. E. 345, 102 A. L. R. 196 (1935).

² 388 Ill. 549, 58 N. E. (2d) 610 (1945).

³ Ill. Rev. Stat. 1945, Ch. 120, § 468 et seq.

⁴ 389 Ill. 281, 59 N. E. (2d) 655 (1945).

buildings and other buildings, who furnish such products as a part of the service rendered to patrons and tenants either without compensation or as a part of the service paid for by the user, then such hotels or buildings are the users or consumers of the articles so that the seller is in the business of selling tangible personal property at retail within the meaning of the Retailers Occupation Tax Act.⁵

Brief mention should also be made of two Illinois Supreme Court cases dealing with inheritance taxes. *In re Estate of Johnson*⁶ declares that property passing under a will but pursuant to a contractual undertaking on the part of the testator is not subject to inheritance tax, even though the contract is not to bequeath a specific sum of money or property of a designated value but rather is to devise an aliquot share. The court had some difficulty in distinguishing apparently contrary decisions, such as that in the case of *In re Gould's Estate*.⁷ It would seem that the instant decision may encourage the employment of similar devices in the future as a means of "minimizing" inheritance taxes. If so, the court may be called upon to limit somewhat the seemingly broad doctrine laid down therein.

*In re Estate of Harding*⁸ raises an interesting point with respect to the right to obtain a reassessment of inheritance taxes under Section 25 of the statute.⁹ Property there had been left in specified shares to the widow and three children, with provision that should any child predecease the widow his share should go to his wife and children. The county court had apparently assessed the original tax on the assumption that the three children took vested interests. One child did predecease the widow, leaving him surviving a widow and three children, with an aggregate exemption of \$100,000. Had reassessment been permitted, a substantial refund would have been in order. Petitioner alleged that the original assessment had been made under

⁵ Ill. Rev. Stat. 1945, Ch. 120, § 440 et seq.

⁶ 389 Ill. 425, 59 N. E. (2d) 825 (1945).

⁷ 156 N. Y. 423, 51 N. E. 287 (1898).

⁸ 388 Ill. 598, 58 N. E. (2d) 524 (1945).

⁹ Ill. Rev. Stat. 1943, Ch. 120, § 398.

Section 25, but this the respondent denied. The court held that the original assessment had not been made on a "contingent" basis so the reassessment provision was not available. It would seem clear that the interests of the three children, even though vested, were subject to being divested so that a contingency was involved within the intendment of the statute. Some language in the opinion might be inferred to support the view that the holding would have been otherwise had the order of the county court definitely stated that the assessment had been made pursuant to Section 25.¹⁰

Although questions arising under the Unemployment Compensation Act¹¹ do not technically belong in the field of taxation, a practice previously established of treating such matters with taxation cases will be followed. Inasmuch as the act does not depend upon the common-law concept of employer and employee,¹² it is not surprising that there have been a number of decisions pricking out the line between employee and independent contractor under the act.

Fuel-oil "haulers," being managers of small corporations or associations with several employees operating trucks for hauling oil, paying their own expenses and the wages of employees, employed principally in hauling products of an oil company for a fixed compensation per gallon, but available to haul for other concerns a part of the time, although using the oil company's garage and having no other address than that of the oil company, were said not to be employees in *Arrow Petroleum Company v. Murphy*.¹³ The same case also declared that fuel-oil "peddlers," or dealers in coal, ice and fuel, each of whom owned their own trucks, one of which was used to haul fuel-oil purchased from the oil company and sold at his fixed price to customers found by him, the oil being charged to him by the oil

¹⁰ That section was amended by Laws 1945, p. 1239, S. B. 415; Ill. Rev. Stat. 1945, Ch. 120, § 398. As amended, the section is susceptible of an interpretation allowing the relief here sought.

¹¹ Ill. Rev. Stat. 1945, Ch. 48, § 217 et seq.

¹² *Rozran v. Durkin*, 381 Ill. 97, 45 N. E. (2d) 180 (1942); *A. George Miller, Inc. v. Murphy*, 379 Ill. 524, 42 N. E. (2d) 78 (1942).

¹³ 389 Ill. 43, 58 N. E. (2d) 532 (1945).

company at their retail price and an agreed difference being paid to him as a commission, were not within the scope of the act.

In another case, that of *Beth Weber, Inc., v. Murphy*,¹⁴ a dress-maker who had space on the balcony of a dress shop, made alterations for the shop at her own prices, the cost being added to the price of the dress sold. She kept her own accounts, paid her own assistants, and was in turn paid weekly on presenting bills to the shop. It was said that she was not an "employee" because she also held herself out as a fitter for others, did work for her own customers in the same place, and the owner of the shop was interested only in the "result" of the work being done.

In several other cases, however, persons, almost equally as independent were classified as employees within the contemplation of the act. Thus, in *Murphy v. Daumit*,¹⁵ a vacuum cleaner salesman, most of whose sales were made on time contracts and "trade-ins" subject to approval of the distributor, the title to the machines remaining in the distributor until transferred to the vendees, was said to be an employee even though the salesman, when taking a machine, signed a receipt reciting its purchase by him subject to the distributor's lien. In another case,¹⁶ certain motorcycle drivers were engaged exclusively in picking up and delivering packages for the operator of a package-delivery service. The latter procured the business, gave telephone directions to the drivers, cleared all packages through his office, and billed customers for all services rendered. The drivers were paid a portion of the fees billed but were, nevertheless, classed as employees.

Fuel-oil "solicitors," employed by a related business which enabled them to sell fuel-oil, but also operating under an arrangement with an oil company to sell on commission to such customers as they might obtain, orders being subject to acceptance or rejection and the solicitors being subject to discharge if their efforts were not satisfactory, were likewise denominated

¹⁴ 389 Ill. 60, 58 N. E. (2d) 913 (1945).

¹⁵ 387 Ill. 406, 56 N. E. (2d) 800 (1944). Wilson, J., dissented.

¹⁶ *Zelney v. Murphy*, 387 Ill. 492, 56 N. E. (2d) 754 (1944), noted in 33 Ill. B. J. 169.

“employees.”¹⁷ Photographers’ models, if not free from the direction and control of the photographer in the performance of their services, provided their services are not rendered outside the usual course of the business, are also “employees”.¹⁸ For that matter, a so-called “distributor” of cosmetics, extracts and similar products supplied by a manufacturer to be sold by canvassers under the direction of the distributor, the manufacturer retaining title to the merchandise until sold, accepting daily remittances for sales made, prescribing the methods of sale, and having the right to discharge the distributor when his sales no longer warranted maintaining the branch outlet, was also treated as an “employee” in *Van Ogden, Inc. v. Murphy*.¹⁹

Several other cases involving problems of liability under the act should be mentioned at least briefly. In *Crouch v. Murphy*,²⁰ it was held that one who incidentally assists as an occasional accommodation and wholly without remuneration in any form is not an employee. The court rejected the argument that since an employee who receives less than the statutory minimum for eligibility to benefits under the act may nevertheless be considered a sixth employee for the benefit of the other five, although himself not entitled to benefits,²¹ so a person performing some service even though he receives no compensation whatever should be considered a sixth employee for the benefit of the other five.

In *Grant Contracting Company v. Murphy*,²² the court held that members of a dredging crew were not excluded from the benefits of the act by reason of Section 2(f) (6) (c)²³ which denies benefits to those whose service is performed “as an officer or member of the crew of a vessel on the navigable waters of the United States.” The men in question were employed on barges

¹⁷ *Arrow Petroleum Co. v. Murphy*, 389 Ill. 43, 58 N. E. (2d) 532 (1945).

¹⁸ *Photographic Illus., Inc. v. Murphy*, 389 Ill. 334, 59 N. E. (2d) 681 (1945), Wilson, J., dissented. The case involves substantially the same situation and holding as in *A. George Miller, Inc. v. Murphy*, 379 Ill. 524, 42 N. E. (2d) 78 (1942).

¹⁹ 390 Ill. 133, 60 N. E. (2d) 877 (1945).

²⁰ 390 Ill. 112, 60 N. E. (2d) 879 (1945).

²¹ *Smith v. Murphy*, 384 Ill. 34, 50 N. E. (2d) 844 (1943).

²² 387 Ill. 137, 56 N. E. (2d) 313 (1944).

²³ Ill. Rev. Stat. 1943, Ch. 48, § 218.

engaged in deepening the channel of the Illinois River, and the movement of the barges was merely incidental to such purpose. Although the laborers and the "bosses" were given nautical titles, they were engaged primarily in excavation, lived at home each night, had no seamen's licenses and performed no services ordinarily identified with navigation.

An unincorporated association of grain trimmers was not an "employing unit" under the act according to *Chicago Grain Trimmers Association v. Murphy*,²⁴ hence it was not liable for assessments made by the Director of Labor. It was found that the association had no source of income except that derived from its members' labor, was not in business for the purpose of earning profits upon capital contributed by its members, and that its only purpose was to provide a practical means of disposing of the services of its members in the loading and unloading of grain to and from ships.

The court in *Panther Creek Mines, Inc. v. Murphy*²⁵ held that the word "wages" as used in the act²⁶ is not so inclusive as the term "earnings" as used in the Workmen's Compensation Act,²⁷ but is instead restricted to remuneration received from "personal service." That case involved "contract miners" of coal who were paid a certain price per ton against which they were charged for powder, caps, and fuses furnished by the employer as well as for blacksmith services. The court held that the employer was not required to make contribution on the amounts so charged and deducted. In a similar factual situation arising under the Workmen's Compensation Act, the court had held that such charges and deductions were to be disregarded and the gross compensation was to be used in computing the compensation allowable to the widow and next of kin.²⁸ To explain the seeming inconsistency, the court observed that it had previously noted that the "basic objects sought by the two acts were so far

²⁴ 389 Ill. 102, 58 N. E. (2d) 906 (1945).

²⁵ 390 Ill. 23, 60 N. E. (2d) 217 (1945).

²⁶ Ill. Rev. Stat. 1945, Ch. 48, § 220.

²⁷ Ibid., Ch. 48, § 144.

²⁸ *Springfield Coal Min. Co. v. Industrial Commission*, 291 Ill. 408, 126 N. E. 133 (1920).

different that decisions construing the Workmen's Compensation Act were of little value as precedents in construing the Unemployment Compensation Act."²⁹

The "War Risk" amendments to Section 18 of the act³⁰ were sustained in *S. Buchsbaum & Company v. Gordon*³¹ despite a claim that they constituted special legislation and denied to certain employers the equal protection of the law. That section deals with rates and payment of contributions by employers to the "fund" provided for under the act. The amendments there criticized were adopted with a view to compelling war-expanded activities to bear their equitable share of the burden of the act. They provided, in substance, for higher rates of contribution by employers whose 1942 payrolls substantially exceeded their 1940 ones. The court recognized the reasonableness of the classification and the necessity for correcting inequalities inherent in "experience" assessments in times of economic instability.³²

VIII. TORTS

Cases in the field of torts involve little that is new in the law. A number, however, apply well-established standards to novel factual situations so as to warrant some comment. As many of these cases arise on appeal from directed verdicts or decisions on motions for judgment notwithstanding the verdict, the entire factual situation is usually not before the appellate tribunal but only that aspect of the evidence is presented which is most favorable to the appellant's case. It is necessary, therefore, that no undue weight be given to any decision as precedent for an entirely different result might have been produced on consideration of the entire record.

There are implications in the decision in *Plotkin v. Winkler*,¹

²⁹ See *Oak Woods Cemetery Ass'n v. Murphy*, 383 Ill. 301, 50 N. E. (2d) 582 (1943).

³⁰ Ill. Rev. Stat. 1943, Ch. 48, § 234.

³¹ 389 Ill. 493, 59 N. E. (2d) 832 (1945).

³² See extract of report transmitted to the governor and general assembly quoted in 389 Ill. 493 at 496-7, 59 N. E. (2d) 832 at 835.

¹ 323 Ill. App. 181, 55 N. E. (2d) 545 (1944).

an attractive nuisance case, which should arouse the interest of landlords owning apartment buildings. The plaintiff there, a nine-year old child, was injured by falling through an inadequately protected air-shaft on the roof of the building where she lived. Access to the roof was obtained from a porch, over a low railing, and up a ladder which had been in place for more than a year before the accident. Plaintiff, and other children, had frequently played on the roof and shouted down the air-shaft to produce an echo. There was evidence of knowledge of this habit on the part of the defendant² as well as evidence that the children never played in the courtyard attached to the premises because of the presence of parked automobiles located there. Directed verdict for defendant in the trial court had been predicated on the ground that (1) an attractive nuisance had to be something which could be seen from the street, and (2) the plaintiff, and the other children, were trespassers. The judgment was reversed and the case remanded for trial because the ease with which young children could reach the roof, the absence of barricades, and the presence of the ladder served as an invitation or even a "challenge" to persons so young. It was also held that, as there was no playground or other facilities for children residing in the building, the plaintiff was not a trespasser. Want of visibility of the attractive nuisance from the street should not be conclusive, as a matter of law, for the plaintiff was rightfully on a part of the premises from which the attractive nuisance could be observed. If, by the decision, it becomes the duty of the landlord to furnish playground space for the children of his tenants, the picture is entirely changed for recourse to the doctrine of attractive nuisance would become unnecessary. The plaintiff would then be an invitee, entitled to the well-recognized affirmative duty to make the premises safe for his tenants. In another landlord case, that of *Hart v. Sullivan*,³ the lessor was

² The action also ran against a bank which held title to the property in trust but which had leased the premises to the other defendant. Directed verdict in favor of the bank was sustained on the ground that, in the absence of contract, the lessee or occupant is responsible for failure to keep the premises in repair: *Marcovitz v. Hergenrether*, 302 Ill. 162, 134 N. E. 85 (1922), and cases there cited.

³ 324 Ill. App. 243, 58 N. E. (2d) 301 (1944), noted in 40 Ill. L. Rev. 142. O'Connor, J., wrote a specially concurring opinion.

held not responsible for the death of a person who fell on unlighted stairs because it was not shown that he was an invitee of the tenant and furthermore was guilty of contributory negligence in going along an unlighted passage while totally unfamiliar with the premises.

Railroad crossing cases appear to manifest an increasing tendency on the part of courts to take the case from the jury and decide the issues as a matter of law. By so doing, they tend to stress the duty of the public to recognize the right of the railroad to facilitate rapid operation of its trains in the interest of modern economic conditions. For example, the question of wanton and wilful conduct, usually a matter of fact, was treated as a matter of law in *Robertson v. New York Central Railroad Company*.⁴ The plaintiff in that case was intending to drive across tracks in a sparsely settled village over a familiar route. He was operating at moderate speed, but saw no train nor heard any warning signal. View along the track was not obstructed any more than is normally the case. The jury found both general negligence and also wanton conduct in (a) the rate of speed, (b) the absence of warning, and (c) the failure to keep a look-out for persons using the intersection. Judgment on the general negligence count was reversed by the Appellate Court because of contributory negligence, but judgment on the wanton conduct was affirmed. On leave to appeal, the Supreme Court reversed on the ground that there was no evidence in the record to justify submitting the charge of wantonness to the jury. It said that neither the absence of warning nor the rate of speed, bearing in mind the surrounding territory, could constitute wilful and wanton negligence and that the engineer was entitled to assume that the driver would refrain from putting himself in a place of danger and consequently was not obliged to stop the train until it became apparent that the plaintiff was not doing so.⁵ The court seemed to treat the absence of warning as a matter of simple negligence. If railroads are to be permitted higher rates of speed in the in-

⁴ 388 Ill. 580, 58 N. E. (2d) 527 (1945), reversing 321 Ill. App. 313, 53 N. E. (2d) 144 (1944).

⁵ *Morgan v. New York Cent. R. Co.*, 327 Ill. 339, 158 N. E. 724 (1927).

terest of prompt and efficient service, it would seem that they should be held more rigidly to the requirement of giving timely warning to travelers on the highway.

The case of *Berg v. New York Central Railroad Company*⁶ also involved a question of railroad speed although the principal issue was one of "cause" or "condition." The plaintiff there was a passenger in a car struck by defendant's train. The highway leading to the crossing was icy and slippery, a fact known or which should have been known to all concerned. Visibility seemed to be poor and there was evidence of a negative character that no warning was given. The driver sought to stop when the train came into view, found himself skidding, and proceeded to "gun" the car across the tracks. Verdict for plaintiff was converted into a judgment in his favor by the trial court despite defendant's motion for judgment notwithstanding the verdict. That judgment was reversed when the Appellate Court, although finding for plaintiff on the issue of contributory negligence, imputed or otherwise, concluded that the icy condition of the highway, rather than defendant's carelessness, was the proximate cause of plaintiff's injury.

On the question of proximate cause, the court commented upon what would appear to be conflicting lines of authority from outside sources⁷ as to whether the jury should be permitted to inquire into the question as to whether or not the driver would have stopped or have attempted to stop had the requisite signal been given. Denial of the right has been said to rest upon the fact that it would allow the jury to enter the field of speculation and adventure. The only Illinois case on somewhat similar facts⁸ seems to turn upon contributory negligence because the plaintiff there was operating a car with defective brakes, while the instant case specifically discloses the absence of contributory negligence.

⁶ 323 Ill. App. 221, 55 N. E. (2d) 394 (1944). The decision therein was reviewed on certificate of importance and affirmed in 391 Ill. 52, 62 N. E. (2d) 676 (1945), not in the period of this survey.

⁷ Compare *Barrett v. United States Railroad Administration*, 196 Iowa 1143, 194 N. W. 222 (1923), with *Miller v. Union Pacific R. Co.*, 290 U. S. 227, 54 S. Ct. 172, 78 L. Ed. 285 (1933).

⁸ *Moudy v. New York, C. & St. L. R. Co.*, 385 Ill. 446, 53 N. E. (2d) 406 (1944).

Nevertheless, the court denied recovery even though the general condition was known to, or should have been known by, defendant. It does not appear that it would be necessary for the jury to enter into the field of "speculation and adventure" to decide that, if timely warning were given by defendant, the driver, as a reasonable person, would have applied the brakes and stopped in time to avert collision. It is unfortunate, therefore, to say that the icy street, rather than defendant's neglect, was the cause of the injury instead of a mere condition.

In *Elliott v. Elgin, Joliet & Eastern Railway Company*,⁹ the Illinois Appellate Court found contributory negligence as a matter of law in the driver's failure to stop, look and listen at a railroad crossing even though the warning signal, of the bell-and-flasher type, was not operating. A directly contrary result was attained in *Surdyk v. Indiana Harbor Belt Railroad Company*¹⁰ where the Circuit Court of Appeals for the Seventh Circuit reversed a judgment notwithstanding the verdict on the ground that the case should have gone to the jury. In that case the railroad maintained crossing gates and there was conflict of evidence as to whether the same were lowered. The Elliott case is not supported by the authorities therein cited for, with one exception,¹¹ they are cases where no warning device other than the ordinary wooden "railroad crossing" sign was involved. The Surdyk case, on the other hand, is fully supported by the authorities¹² and probably represents the true state of the present Illinois law on the subject. The Elliott case approaches perilously to the point of depriving the plaintiff of trial by jury.

Automobile cases have raised interesting questions.¹³ In *Budds*

⁹ 325 Ill. App. 161, 59 N. E. (2d) 486 (1945). Kiley, J., wrote a specially concurring opinion. Leave to appeal has been denied.

¹⁰ 148 F. (2d) 795 (1945).

¹¹ The cited case of *Briske v. Village of Burnham*, 379 Ill. 193, 39 N. E. (2d) 976 (1942), noted in 21 CHICAGO-KENT LAW REVIEW 92, dealt with an obstruction in a street which consisted of a permanent barricade painted in alternate stripes and bearing a red reflector.

¹² *Humbert v. Lowden*, 385 Ill. 437, 53 N. E. (2d) 418 (1944); *Chicago & E. I. R. Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050 (1904); *Chicago & A. R. Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633 (1900); *Greenfield v. Terminal R. Ass'n of St. Louis*, 289 Ill. App. 147, 6 N. E. (2d) 888 (1937); *Oswald v. Grand Trunk Western Ry. Co.*, 283 Ill. App. 86 (1936).

¹³ The decision in *Palmer v. Miller*, 323 Ill. App. 528, 56 N. E. (2d) 447 (1944),

v. *Keeshin Motor Express Company, Inc.*,¹⁴ the court, refusing to disturb the verdict of the jury, reiterated the principles that the law does not charge one with the duty of anticipating dangers but permits him to assume that others have performed their duty to give proper warning of hidden dangers;¹⁵ that persons forced to act in sudden emergencies are not to be judged by hindsight;¹⁶ and that a person without fault, confronted with sudden danger, although obliged to exercise ordinary care for his own safety, is not expected to act with the same deliberation and foresight as would be expected under ordinary circumstances.¹⁷ To much the same effect is the decision in *Roady v. Rhodes*.¹⁸

It is a familiar practice for city bus drivers, when blocked from regularly established stopping places, to stop at a point to the rear thereof and usually distant from the curb to permit passengers to board or alight. That practice was involved in *Van Hoorebecke v. Iowa Illinois Gas & Electric Company*¹⁹ where plaintiff, after completing part of her journey, waited to transfer to another bus. The second bus was unable to get to the curb and there was some evidence that the driver motioned the awaiting passengers, including plaintiff, to board well back of the regular place. The street was slippery and plaintiff fell as she moved forward. The trial court granted judgment notwithstanding a verdict for the plaintiff. That decision was reversed and a new trial ordered on the ground that plaintiff, when she started toward the bus under the conditions shown with intent to board it and as a part of a continuous journey, was a passenger and entitled to the protection afforded to such persons.²⁰ Defendant's reliance on *Davis v. South Side Elevated Railroad Company*²¹ to show that its duty was merely to provide reasonably safe

an extension of the earlier decision in 380 Ill. 256, 43 N. E. (2d) 973 (1942), noted ante p. 45, discusses the liability of a minor for failure to control the conduct of a companion placed in charge of the minor's car.

¹⁴ 326 Ill. App. 59, 61 N. E. (2d) 579 (1945).

¹⁵ *Pollard v. Broadway Central Hotel Corp.*, 353 Ill. 312, 187 N. E. 487 (1933).

¹⁶ *Barnes v. Danville St. Ry. & Light Co.*, 235 Ill. 566, 85 N. E. 921 (1908).

¹⁷ *Synwolt v. Klauk*, 296 Ill. App. 79, 15 N. E. (2d) 895 (1938).

¹⁸ 326 Ill. App. 49, 61 N. E. (2d) 584 (1945).

¹⁹ 324 Ill. App. 88, 57 N. E. (2d) 652 (1944).

²⁰ *Feldman v. Chicago Rys. Co.*, 289 Ill. 25, 124 N. E. 334 (1919).

²¹ 292 Ill. 378, 127 N. E. 66, 10 A. L. R. 254 (1920).

depots, platforms and approaches, rather than to exercise the highest degree of care, was declared to be unsound. The higher degree of care required when passengers are boarding or alighting from the carrier's vehicles was said to rest on the fact that the danger is as great as if the passengers were on moving equipment.

Again there was argument over the question of proximate cause, the defendant contending that it was the slippery condition of the sidewalk and not the action of the defendant's driver which produced the injury. On this point, the court held that as the slippery condition existed before the bus drove up, the stopping thereof and the invitation to board were subsequent independent acts which, if proved, rendered the contention of the defendant inapplicable.

The opinion of the Appellate Court in *Johnson v. Stevens Building Catering Company*²² contains a criticism of the language in some earlier Illinois cases on the subject of *res ipsa loquitur*. With regard thereto, the court said:

While it has been said in some Illinois cases that the presumption of negligence raised by the application of the doctrine of *res ipsa loquitur* is not absolute or conclusive but is rebuttable and vanishes when any evidence appears to the contrary, it seems to us that where the doctrine is applicable the use of the term "presumption of negligence" is an inapt and unfortunate characterization of the prima facie case made out by the fact of the injury itself and the circumstances attending it. Of course such a prima facie case is neither absolute nor conclusive but to say that it "vanishes entirely when any evidence appears to the contrary" is equivalent to holding that regardless of how flimsy the explanation offered by a defendant may be as to its exercise of due care in connection with the instrumentality that caused the injury and regardless of the incredibility and improbability of the explanation, such explanation must be accepted as true. If that were the correct rule a plaintiff could never

²² 323 Ill. App. 212, 55 N. E. (2d) 550 (1944).

recover under the principle of *res ipsa loquitur*, if a defendant offered any evidence by way of explanation of due care on his part, no matter how incredible and improbable such evidence might be. A *prima facie* case cannot vanish but must be submitted to the jury with the evidence presented by defendant. It is the province of the jury to determine as a question of fact whether the evidence introduced by a defendant in explanation of the occurrence is consistent with due care on his part and also to determine the credibility and probability of such evidence.²³

Such an unusually clear and lucid expression of a concept which is not new is rarely found for the doctrine has been clouded by loose and inconclusive language as to "presumptive negligence." The criticism is most apt and is well-warranted.

Although not strictly a matter of tort law, the recent amendment to the Motor Vehicle Act,²⁴ effective January 1, 1946, may have some bearing on the likelihood of the person injured in an automobile accident receiving satisfaction for any judgment he may be able to obtain. By that amendment, the operator of a motor vehicle involved in an accident, where the damage to the property of any one person exceeds \$50.00, must make prompt report thereof and display evidence of financial responsibility. If he cannot, he is faced with suspension of his driving license. Should security be deposited to prevent forfeiture of driving privileges, the same is made available only to the payment of any judgment which may be rendered arising out of the accident.

²³ 323 Ill. App. 212 at 218-9, 55 N. E. (2d) 550 at 553.

²⁴ Laws 1945, p. 1078, S. B. 492; Ill. Rev. Stat. 1945, Ch. 95½, §§ 581-58n.